REVIEW

OF THE

MAHOMEDAN LAW OF WAKF

ACCORDING TO

OOSOOL-I-FIKAH

OR

MAHOMEDAN JURISPRUDENCE

BY

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ERRATA.

For	*Read*	*For*	*Read*
Wakf	Waqf	Akbbar ?	
Zakat	Zakát	Aitkad	I'tiqád
Ijtihad	Ijtihád	Qasa ?	
Cazees	Qazés	Noum	Naum
Sawab	Sawáb	Sookr	Sukr
Ahlieut	Ahlíyyat	Khuta	Khatá
Mahul	Mahal	Ikrah	Ikráh
Husun	Husn	Ikhtear	Ikhtiyár
Koobooh	Qubh	Shafiei	Sháfi'í
Suheeh	Sahíh	Fasid	Fásid
Batil	Bátil	Khumur	Khamr
Ahul	Ahl	Khinzeer	Khinzír
Shurt	Shart	Hedaya	Hidáyah
Shera	Shar'a	Fikah	Fiqh
Illat	Illat	Osool	Usúl
Fuzoolee	Fuzúlí	Rudul Moohtar	Radd-ul-Muhtár
Insha	Inshá	Futawai Alumgeery	Fatawá-i-Álamgiri
Sihut	Sihhat	Hookm	Hukm
Huram ?		Khitab	Khitáb
Meesak	Mísáq	Fail	Fi'l
Akl	Aql	Mookulluf	Mukallaf
Buloogh	Bulúgh	Iktiza	Iqtizá
Awriz	Awáriz	Kulub	Qulúb
Tusurroofat	Tasarrufát	Wujoob	Wajúb
Tumuddoon	Tamaddun	Ada	Adá
Wazai	Wázi'í	Batin	Bátin
Tukleefy	Taklífí	Sumawee	Samáwí
Mahkoom-i-bibi	Mahkúm-i-bihí	Mooktasab	Muktasab
Wajood-i-Hissee	Wajúd-i-Hissí	Joonoon	Junún
Wajood-i-Shurjee ?	Wajúd-i-Shar'í	Atuh	'Atúh
Moobah	Mubáh	Nisyan	Nisyán
Moosullum	Musallam	Ighma	Ighmá
Shuryee	Shar'í	Rikk	Riqq
Huzl	Hazl	Hyz	Hayz
Tradut	Trádat	Murz	Maraz
Neeut	Níyyat	Mout	Maut
Taljeea	Taljíyah	Jehel	Jahal
Tawazo	Tawázú	Sufha ? Probably	Shafá
Taleek	Táliq	Hebba	Hibah
Admu-i-Aslee	'Adam-i-Aslí	Ijara	Ijárah
Khyar	Khiyár	Arjat	'Ariyat
Tasuroof	Tasarruf		

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REVIEW AND ITS APPENDAGES.

reason not being accepted by the Mahomedan Jurists as consonant to their religion: referred to in paragraph 16 of the Memorial. p. 207*n*.

13. Appendix V to the Memorial, being contributions by Sir Comer Petheram to the "Law Quarterly Review" for April 1899, entitled English Judges and Hindoo Law; referred to in paragraphs 14 and 30 (XX) of the Memorial. p. 210*n*.

14. Appendix VI to the Memorial, being extracts from Sell's Faith of Islam on Zakat and Ijtihad, referred to in paragraphs 17 and 29 of the Memorial. p. 212*n*.

15. Appendix VII to the Memorial, being extracts from Morley's Digest, referred to in paragraph 18 of the Memorial. p. 233*n*.

16. Summary of the contents of the notes of argument as contained in Appendix VIII of the Memorial. p. 245*n*.

17. Appendix VIII of the Memorial, being the notes of Argument of Moulvi Mahomed Yusoof, B.A., B.L., Khan Bahadoor, before the Full Bench; referred to in paragraphs 11, 12, 15, 16, 17, 18, 19, 20, 29 and 30 of the Memorial. p. 250*n*.

18. Supplement No. 1 containing matter in continuation of para. 21 at p. 168*n*. This supplement contains paragraphs numbered 22 to 30. p. 296*n*.

19. Supplement No. 2 to the Review containing Arabic Extracts from the following works referred to in para. 21 at p. 168*n* of the Review containing the following extracts:—

Miratool Asool, p. 62.

1. Azmery, p. 272; Miratool Asool, p. 78, 79 and 281.
2. Azmery, p. 361; Miratool Asool, p. 289; Kushf-i-Bazdawee, Vol. I, p. 268.

Raddool Moobtar, Vol. IV, p. 3. p. 303*n*.

20. Supplement No. 3 to the Review referred to in Item No. 6, being Appendix B to the Review referred to at p. 157*n*, containing Arabic Extracts from certain authors, *viz.*:—

1. Azmery, p. 291, etc.
2. Azmery, p. 444 (omitted); Miratool Oosool, pages 66 and 67. p. 316*n*.

21. Supplement No. 4, being Extracts of Texts from Arabic Authorities bearing on the question of Taamuloon Nass or custom and practice of mankind, referred to in para. 30 to be found in Supplement No. 3, Item 1—Extract from (red book). p. 317*n*.

22. List of Errata. p. 138*n*.

REVIEW OF THE LAW OF WAKF.

List of Contents of Paragraphs of the Review.

Part I.—Introduction and Explanation.

Para.

I. God's will is necessary in every case: Illut: Pre-ordination and Predestination.

II. There must be a person or subject to invoke the will of God.

III. Some object.

IV. Means of invocation must be in conformity with the Shera.

V. Invocation must pass from the subject to the object.

15. Therefore. p. 128*n*.

(I) Ahleut as involved in II.

(II) Formulæ as involved in IV.

(III) Mahal as involved in III. Hoosn and Koobuh: Suheeh and Batil. Instances of Ahul and Mahal.

(IV) The formula to be unaccompanied by a condition or Shurt. This is the same as V.

15*A*. How I work out my conclusion from the four propositions stated in paragraph 15 is this: *viz.*, the conclusion I have to establish is that a Mahomedan Wakf, such as the Privy Council has held to be void, is absolutely and positively valid according to Mahomedan Law; and the steps to arrive at that conclusion are these. p. 130*n* :—

1°. God produces effects of all human actions. (See paragraphs 13B and 13C.)

2°. The Shera has laid down how man can know whether God has produced the resulting effect of a particular human action: the ways to know 'the how' are amongst others as follows.

3°. There must be a fit person to make use of a sign established and recognised to rouse God's will to activity. The qualifications necessary for such a person are concentrated in a short word, *viz.*, Ahul, which is carefully defined: *e.g.*, if it is sought that a Wakf should get created by the will of God or that a sale should get accomplished by such will, or that a marriage should be established by such will, the first thing necessary is that there must be some person to move the will of God, and that person is called an Ahul. Who is an Ahul and what is Ahleut is discussed in paragraphs 16 and 17. And as regards Ahleut in Wakf it will be noted that the Wakif or Wakf maker must continue to be a fit subject to receive Sawab; and he must not, after the Wakf, become a heretic otherwise his Wakf would be multified. See para. 6 of the Review.

4°. The Ahul or fit person having been ascertained, the next requisite is that this Ahul must use signs laid down by the Shera calculated and designed to provoke God's will, and influence that will so as to produce a worldly effect: these signs consist of certain formulæ which must be uttered by the Ahul if effect is sought to be produced on behalf of God:

These formulæ are also called Illut, *i.e.*, creating cause; but this is only in a metaphorical sense, because the real Illut or creating cause is God himself; *e.g.*, in order that a Wakf, a sale, or a marriage should come into existence from a state of non-existence, it is necessary that the Ahul should use the necessary formulæ, *viz.*, "I make Wakf"; "I sell" and "I purchase"; "I marry thee," and "I accept thee." The effect of the use of the formulæ is discussed in paragraphs 18, 19, 22. Thus the operation of all contracts arises not from the agreement incorporated in the contract or from any matter of estoppel or any equitable principle, but the same is the result of Illut showing a mandate from God the creator of all things small and great, insignificant or serious and solemn.

4°*A*. The reasons which influence the Shera to hold the view that when an Ahul uses the formulæ (other necessary conditions relating to Mahal, etc., being fulfilled) the result must be created by an Act of God, are shown in paragraphs 20, 21, 22, 23 and 24.

4°*B*. As a corollary from the rule in respect to the effect of signs or formulæ which operate by the way of Illut, intention has no place in Mahomedan Law, and this point is discussed in paragraph 25.

Another corollary is the rule which enables a volunteer (or Fuzoolee) to sell another person's property for that other person, he being absent, and the sale is valid subject to the real owner's consent. This point is discussed in paragraph 25A, and to put it so as to attract attention to the main thread which runs throughout the Mahomedan Jurisprudence, *viz.*, there must be an Ahul, a Mahal, an Illut and the impact of that Illut from the Ahul to the Mahal, I say that the rule by which a third party, *i.e.*, a Fuzoolee or a volunteer, is enabled to sell another man's property for him is of greater practical use, in a homely and unpretentious way, than more elaborate provisions in other institutions, *e.g.*, provisions relating to executor *de son tort* and that the sale by a Fuzoolee is not open to the sneer that Mahomedan Law allows a man in the street to sell another man's property: on the other hand that rule illustrates a general principle which permeates throughout the Mahomedan Jurisprudence.

5°. Another requisite is that there must be a fitting subject in reference to which God's will is to be exercised: this fitting subject or object is called the Mahal, *e.g*, in the three instances mentioned above, the Mahal is property such as the Shera recognises in the case of Wakf and sale, and the woman or female is the Mahal in the case of the marriage: if the Mahal in the case of Wakf and sale is pork or wine or any other thing not coming within the definition of property under the Shera, the formulæ uttered by the Ahul should be uttered in vain, for in that case God's will would not be aroused: and it is for this reason (and for no other) that there could be no marriage between a man and a beast, the latter being no

Mahal whatever; and therefore God's will aroused by the Ahul using the formulæ falls short of producing a result, that is to say, it is not aroused at all just as if the electric current either refuses to act or in its course meets a non-conductor. The question of Mahal is discussed in paragraph 26.

6°. Thus there being an Ahul and a Mahal, and a sign in the shape of a formula or Illut, the next requisite is that the Ahul must so use the sign that the same must pass on from him to the Mahal: in other words, his volition must be so exercised that the Illut should apply to the Mahal and not fall short of reaching it: *e.g.*, in the case of a Wakf "the appropriation must be at once complete and not suspended on any thing," as Baillie puts it; because no space of time should intervene between an Illut and its effect: This question is discussed in paragraph 27.

7°. When there is (1) a fit Ahul; and (2) a fit Mahal; (3) an appropriate Insha or formula to stand for and serve the purpose of the Illut or in fact to be itself the Illut; and when (4) the Illut moves on from the Ahul to the Mahal, then the effect gets produced by the Will power of God and no human power can prevent it or anticipate it.

8°. When the four conditions mentioned in the above paragraph are established, then the result, for the purposes of this world, is Sihut or validity of the transaction, and for the purposes of the other world the result is Sawab or future reward. (See Mira, p. 276 and p. 277.)

9°. If there is absence of Ahul or absence of Mahal, then the will of God does not get moved by the invocation of the formulæ: *e.g.*, if there is insanity, then the person is not Ahul; and if there is impurity or defect in the property it is not Mahal: in such cases the will of God not being moved at all, the result for the purposes of this world is that the transaction is Batil or void and of no worldly effect; and as regards the world to come the result is Huram, that is, it involves future punishment. (See para. 26).

16. As to (1)—of paragraph 15 Ahleut, Meesak: Akl, Buloogh: 15 years. p. 130*n*.

17. Awariz to Ahleut. p. 132*n*.

18. As to No. (II) of paragraph 15, 1 C.L.J., p. 120*n*, paragraph 7: Consideration: case in 2 C.L.J., p. 166 and 171. p. 132*n*.

19. Item No (II)—made more clear. Illut is followed by its result. Tusurroofat. Tumuddoon; Insha embodies the Illut and therefore the result follows. p. 134*n*.

20. Commands Wazai and Tukleefy—reference to Appendix A. Why two sorts of command. p. 135*n*.

21. The effect of a legal formula is to create a right because it involves the idea of Sawab: Wakf in its very essence involves the idea of Sawab and that distinguishes it from other legal dispositions. p. 135*n*.

22. Two propositions. p. 135*n*.

noticed. Sleep, Iradut and Ikhtear become negatived : therefore words have no effect.

(*d*) Sookr—1st kind, *i.e.*, that by medication, in which words have no effect. If by intoxicating drugs, then Ahleut is not affected and words have effect and divorce, etc., take place.

(*e*) Khuta : thou art "seated :" by slip, thou art "divorced :" latter takes effect. Shafiei differs : we say the man is ahul : he says no ; we *say, the formula was used with volition though not with intention.*

(*f*) Ikrah—Words used are with Iradut or volition although under compulsion.

25*a*. A Sale by a Fuzoolee.

26. Question No. (III) as in paragraph 15, *viz.*, Mahal, Instances of Mahal, p. 145*n*. For Mahal of Wakf see paragraphs 53, 54, 55, 59 of arguments before Full Bench, being Item No. 17 of the Table of Contents.

(*a*) Upon what principles Ahleut depends, I have already shewn : upon what principles Mahaleeut depends, I will now shew.

(*b*) Mahal : wife ; subject-matter of sale is Mahal, and not consideration : Goodness or Hoosn : Wakf has Hoosn.

(*c*) Void or Batil : Koobuh or badness : consideration, nudum pactum : Fasid : Khumur and Khinzeer : Ameer Ally and Baillie on the effect of an invalid act, *e.g.*, Marriage, Mr. Ameer Ally's mistranslation.

27. As regards No. (IV) of paragraph 15 : Ballie : Wakf cannot be suspended on a contingency. p. 149*n*.

28. Therefore a Wakf made as the Mahomedan Law directs is by no means void or Batil and P.C. has interfered with and repealed the law not only as regards Wakf but also as regards what is Batil. p. 149*n*.

29. Case between heirs I.L.R. 30 Cal. Series. 330 ; Mujibunnessa. *v.* Abdul 28 I.A., p. 15 ; S.C. 5 Calcutta Weekly Notes, 177, decided in November and December, 1900. p. 149*n*.

30. Charge of fraud and swindling against Mahomedan Law. p. 149*n*.

REVIEW OF THE LAW OF WAKF.

PART I.

Introduction and Explanation.

1. Before the abolition of the institution of the Cazees (and Pundits) in connection with Civil Courts, the latter took the Mahomedan Law from the Cazees ; and the result on the whole was satisfactory in so far as, in the vast majority of cases, the view taken by the Cazee was in strict accordance with the correct exposition of the Mahomedan Law. The second Vol. of Macnaghten's Mahomedan Law is wholly an embodiment of the Cazees' Futwas (See Sloan's Edition). But time brought on some sort of degeneration. The Cazee system was found faulty and there was some lurking suspicion of corruption, but on the whole the Reports of the old Sudder Dewani Adalat and of Moore's Indian Appeals testify to the correctness of the views expounded by the Cazees and adopted by the Civil Courts. But in seeking to improve the Cazee system, instead of the remedy being applied to the then existing causes of evil, the institution itself was abolished, probably because it was expected that altered circumstances would lead to improved and increased knowledge of Mahomedan Law. But this expectation has not been fulfilled according to public verdict.

2. After the abolition of the Cazee system it is very seldom that one comes across a decision on a disputed question of Mahomedan Law which is consistent with the instincts of the Mahomedan Law and of the principles authoritatively and conclusively expounded in that law. It is not necessary here to state the causes of this disappointment, although no doubt the blame lies both with the Government and with the public, including in the latter the judges who preside over the Civil Courts : the former because there was a time when the subject of Mahomedan Law received great attention from the Government and the Government as the successor of the old Mogul, at least took care that old Mahomedan works of authority should get printed in India : accordingly there exist with us some very old copies of the first editions of the Hedaya and other works of authority. But this supply (which by the way benefitted only the Cazee) is now wholly exhausted. Nawal Kishore of Lucknow tried to enrich the Mahomedan literature by bringing out rare works of Mahomedan Law from his printing office, but these works were incorrectly printed and are mostly illegible and always without a finish about them. The public is also responsible for the unsatisfactory state of knowledge of Mahomedan Law because no attempt is made, either generally or in special cases,

to get at the true principles of Mahomedan Law; no doubt the excuse is that there are not sufficient number of English translations from the original works on Fikah and none at all on the Osool (Jurisprudence). Correctly printed works of authority (*e. g.* the Rudul Moohtar) are imported in India from Mahomedan countries: and the apathy of the Government and its want of interest in this matter has drawn the notice of Mahomedans both Sheahs and Sunnies.

Whatever might be the cause, the fact remains, that the vast range in Mahomedan Law which was open to the Cazees, is at the present moment not open to those who have now to dispense and deal with Mahomedan questions and who have to rest content with the very elementary work of Sir William Macnaghten on Mahomedan Law; there is of course the very condensed abridgment of the vast matter contained in the volumes of the Futawai Alumgeery by Mr. Baillie, who has in some cases so interspersed his own views and inferences with the translation that men of great reputation and name have mistaken such views and inferences for translations themselves and have supposed them to exist in the original Arabic, the second hand translation of the Hedaya by Hamilton, and other minor works not purporting to be translations but expositions of law without any guarantee for accuracy. There is no English translation of any work on Jurisprudence, and in the absence of such a translation, the aforesaid works on Mahomedan Law imperfectly executed as they are, are with some excuse liable to be very imperfectly understood.

3. Under these circumstances it is a matter of supreme satisfaction and heartfelt congratulation, in fact it is a piece of good luck, to come across a decision of a Division Bench of the High Court (see *Mofazzul Karim* v. *Mohammed*, 2 C. L. J. 166) which deals with the law of Wakf in the primitive and therefore sound mode of treating a question of Mahomedan Law and not in an advanced and therefore a risky mode of deciding Mahomedan Law questions. The decision shows an honest and zealous attempt to get at the foundation of the Mahomedan Law of Wakf by getting at original authorities and trying to enter into the spirit of Mahomedan Law instead of supplementing want of information on Mahomedan Law by knowledge of rules derived from modern works on Equity. The result has been that probably for the first time in the history of the administration of Mahomedan Law in India, the true principles by which the doctors of Mahomedan Law have been swayed in a Wakf case, are laid down. And inspite of the decision of the Privy Council in Wakf cases, the Mahomedan point of view from which the question of Wakf is to be regarded, is steadily kept in view in that decision and is most clearly and fearlessly laid down; that principle being that a Wakf is a disposition for consideration just as a sale, with this difference that the consideration in the latter is a worldly matter and has a worldly value, whereas in the former the consideration

is Sawab and has a value hereafter. This was what I had contended for in my argument before the Full Bench in *Bikani Mia* v. *Shuk Lal*, I. L. R. 20 Calc. 126, and although no effect was given by the Full Bench or by the Privy Council to the scantily reported argument referred to above, still I feel gratified to find ultimate recognition in the most recent decision on the Wakf question, of the view which I had pressed before the Full Bench and which was founded on a careful and patient study of Mahomedan Jurisprudence ; (see *Mofazzul Karim* v. *Mohammed*, 2 C. L. J. 171 lines 1-10) : and thus the whole of the Mahomedan community is infinitely obliged to the said learned Judges for having taken the troublesome course to inform themselves of the Mahomedan Law instead of the easy reference to equitable principles to which the mind is familiar by University education and by the associations of early professional training : the learned judges might have made a short work of the whole of the subject by saying that Sawab had no earthly or worldly and therefore no judicial value and was not sufficient to form consideration for any dealing in this world, where the interests of commerce alone predominated.

4. The aforesaid decision of the Division Bench of this Court affirming the true basis of Wakf has encouraged me to write a review on the law of Wakf to show the unsatisfactory state in which this law stands at the present moment to the detriment and confusion of a considerable number of His Majesty's subjects. I have been led to adopt this course because although the highest Court *viz.* the Privy Council has laid down the law against the validity of Wakf, still the general feeling amongst all communities is that the Mahomedan Law has not been correctly laid down by that august tribunal. And this is a correct exposition of the public opinion not only in India but throughout the world, when the matter is viewed impartially. I also share in that view, the more so because my arguments could not be presented to the Privy Council, and the reasons assigned by the Privy Council are not based upon a correct view of Mahomedan Jurisprudence or of Mahomedan Law. I will presently show where the error of the Privy Council lies and how it is not an authority (apart from being the decision of the highest Court of the country) to satisfy the Mahomedan conscience in the face of the direct and positive authorities which are in favor of the validity of the Wakf institution and in the face of the principles of jurisprudence which govern Mahomedan Law, and which render the view of the Privy Council an impossibility. Mr. Justice Ameer Ali in his judgment adopted a course to establish the validity of a Wakf by a line of argument which had no effect with the Privy Council, and perhaps their Lordships had some justification for disregarding the line adopted by that eminent judge, inasmuch as what that learned judge did was to shew how the view of the law stood, as it appealed to

the sentiment instead of showing how it stood as it appealed to the reason which governed that sentiment from the starting standpoint ; so that instead of showing how the institution of Wakf was based on authoritative Mahomedan jurisprudence, and necessarily follows certain assumed principles fully demonstrated in their fit place and was absolutely necessary to reconcile the Mahomedan Law, one part with the other, what he did was to repeat instances of usage and practice. But what finally influenced the Privy Council (see *Abul Fata* v. *Russomoy*, L. R. 22 I. A. p. 85) had already been anticipated by me in my arguments before the Full Bench. But my arguments necessarily oral, having been based upon a study of the Mahomedan Jurisprudence in original Arabic, I do not think they were duly followed by the High Court Judges, so that one of the learned judges Mr. Justice Prinsep says (at p. 214, 215, of the Full Bench Report in *Bikani Mia* v. *Shuk Lal*, 20 Calc. Series), "Questions have been argued before the Full Bench for 8 days in the course of which there has been considerable discussion on complicated points of Mahomedan Law, and their application to cases, such as that brought by the plaintiffs in this suit &c., &c." And again at p. 224, that learned judge says as follows :—"The view of Mahomedan Law pressed on us at the hearing of these appeals is certainly new to all Courts, and I may say that I have no recollection during a long experience of its ever having been addressed to me. It certainly has never found any place in any of our Reports, nor can we find that in any of our Reports were Wakfs, founded on the principles which we are asked to adopt, ever brought before our Courts." This was the only consolation I received for my study of Mahomedan Jurisprudence, *viz.*, that I had propounded a new if not a novel view. There being no English translation of any Mahomedan text book on Jurisprudence, the ideas which I submitted at the time of the oral argument simply remained present temporarily to the mind, being abstruse and uninviting, not to say repulsive in their nature ; there was no wonder that those ideas faded at the lapse of every minute that succeeded the oral argument ; so that in the end the result was that something new had been said which was not accepted by some of the Judges without reproducing my arguments and meeting their force by reasoning based on Mahomedan Law. I say some of the Judges, because all of the Judges did not reject my argument. On the other hand, the Chief Justice, the Hon'ble Sir Comer Petheram was impressed in my favour, but in consequence of the abstruse nature of the ideas involved in the juridical view presented to the Court, the view put forward by the learned Chief Justice in his judgment did not reflect the peculiar doctrines upon which I relied, and which ultimately, as appeared from the decision of the Privy Council were most relevant to the decision of the case. However, a sense of satisfaction was afforded to the mind of the learned Chief Justice and he gave his own reasons for the decision in favor of Wakf which were not

deemed satisfactory to the Privy Council. In connection with my present attempt to review the Law of Wakf, I entertain a hope that a much larger and a much more liberal and substantial measure of justice and attention would be meted out to me by the public on this occasion than the scant measure to be found in the above extracts from Mr. Justice Prinsep's judgment.

5. The chief argument, rather the only argument for which the Privy Council refuses to accept the positive and direct authorities on the question and goes the length of holding that Wakf of the nature set up is not an institution of the Mahomedan Law, is that it is in their opinion, inconsistent with the law of gifts; because the Privy Council say (see *Abul Fata* v. *Russomoy*, L. R. 22 I. A. 85) that "they asked during the argument how it comes about that by the general law of Islam at least as known in India, simple gifts by private persons to remote unborn generations of descendents, successions *i. e.*, of inalienable life interest, are forbidden and whether it is to be taken that the very same dispositions which are illegal when made by ordinary words of gift become legal if only the settler says that they are made as a Wakf in the name of God or for the sake of the poor. To these questions no answer was given or attempted, nor can their Lordships see any." Of course there was no answer available to the Privy Council at that time. Mr. Justice Amir Ali's decision did not contain a direct answer to the questions of the Privy Council. But the answer was contained in my argument before the Full Bench referred to above and is contained in the recent decision of the High Court referred to above deciding a very important and relevant principle in connection with Wakf cases *viz.* at p. 171 of 2 Calcutta Law Journal, and that is that the law of Wakf is based upon the principle that Wakf is a disposition for consideration whereas gift is one without consideration: and that makes all the difference in the world between a Wakf and a gift, so that no comparison is possible between a Wakf and a gift: and if a comparison is possible and was made by the Privy Council, why did not the Privy Council do the reverse of what they did, *viz.* why did they not say, that tying up having been allowed by the institution of Wakf they should be allowed in the law of gifts and that therefore the law of gifts should be moulded on the law of Wakf and not *vice versa*: there must have been some reason for the preference: the reason is not far to seek: it consists of the prejudice imbibed by early training in only one particular line *viz.* in the line adverse to perpetuity and favorable to the interests of commerce: and this bias has had effect in the misconstruction of Mahomedan Law; but the Mahomedan Law looks with indifference on the question of perpetuity, that is to say it has no bias against it, on the other hand Wakfs being based on the idea of Sawab, they are to be encouraged: if perpetuity has a tendency against commerce, that matters very little, because what secures future reward

is of more real value to man than rupees, annas and pie which have only a worldly and therefore an inferior and artificial value. This, that is, the question of consideration, is one point on which the Privy Council is silent and which forbids comparison between a Wakf and a gift *viz.* that the former is based on consideration and the latter is not a Wakf in which the property is tied up cannot also be compared to a sale in which the property gets transferred. Further more, effects are produced according to the nature of the Illut and that depends, as will be explained according to the difference in the formulæ used. But there is another point of greater importance which shews the test applied by the Privy Council is fallacious.

6. That the theory of Sawab governs the whole of the law of Wakf and not analogies from the law of gift, is shewn by the law which applies to the following cases and governs it. A Mahomedan makes a Wakf strictly according to the conditions laid down by the Privy Council for the validity of a Wakf : Suppose he becomes afterwards a renegade and a heretic from Islam and therefore ceases to be a fit subject for receiving Sawab. According to Mahomedan Law, his Wakf falls to the ground and becomes void or batil because he ceases to be an Ahul or fit subject to receive Sawab : but according to the Privy Council law, the Wakf is valid and will remain so for all time to come. Further more the decision of the Privy Council is calculated to foster irreligious ideas amongst the Mahomedans and to give rise to litigation where litigation was not dreamt of before *viz.* the parties to the Wakfnamah itself might be tempted to question their own acts done in a religious mood of mind quite forgetting that they have already received consideration in the shape of Sawab and that the consideration is not executory but executed : the heirs and representatives of those who have made Wakfs might similarly be tempted to question the acts of their ancestors regardless of the fate of the latter in the world to come : there will thus be introduced a new source of discord in a family which otherwise would have lived happily and in peace. This tendency and this fear is not based on imagination but on actual facts in the form of cases which have come before Civil Courts.

There is still another case to which the same observation applies : *viz.* the difference between the Wakf of a male apostate and that of a female apostate. The former must be put to death and is therefore in the interval assumed to be dead and is not therefore fit to receive Sawab even as a Zimmee or an infidel under the protection of the Mahomedan Government. The female apostate cannot be put to death on account of her sex and her Wakf in the case of apostacy is good as that of a Zimmee. The case of the heirs suing to set aside Wakf is not a mere speculation and abstract reasoning A case involving the question was decided by the High Court (see *Fatima Bibee* v. *Ahman Baksh*, I. L. R. 31 Calc. 319) where no creditors were concerned but the heirs fought amongst themselves and the High Court

thought that even among the heirs the principle ruled by the Privy Council applied : so that the result has been that all Wakfs which in details transgress the rule laid down by the Privy Council are taken to be absolutely void (batil) ; but the term void or batil has in Mahomedan Law a totally different sense.

7. The challenge thrown by the P. C. I most gladly accept if I may venture to express myself in that way. In fact I have already before this accepted the same ; for on the 8th December 1899 (the P. C. decision in *Abul Futa* v. *Russomoy*, L. R. 22 I. A. 76 having been dated in December 1894), I as president of the National Mahomedan Association, sent through the Secretary of the Association to the Government of India a memorial on behalf of the Mahomedan subjects of Her Most Gracious Majesty the Queen Empress of India, setting forth the arguments in favour of the validity of a Mahomedan Wakf and submitting that the Privy Council decisions did not correctly represent the Mahomedan Law. Various appendices were annexed to the Memorial containing various influential and valuable western opinions in favour of the Institution of a Mahomedan Wakf : One appendix consisted of the argument of the President who as a Vakeel engaged in the Full Bench case had argued before that Bench the proposition in favour of the validity of Wakf. These arguments were imperfectly reported in the authorised Reports and were consequently not available before the Privy Council but the authorised report contained the germs and the kernel of what was subsequently enlarged and explained in that appendix. And I am quite sure if the Privy Council had been in possession of the points made by me before the Full Bench, their decision would necessarily have been in favour of the validity of Wakf : I say, such would have been the result, because I find that the reasons which weighed in their Lordship's mind were all met by my arguments before the Full Bench and in as much as the difficulties of their Lordships of the Privy Council in the way of validating the Wakf, were all those that were expressed in the judgment, I entertain the certainty that if my arguements had been placed before the Privy Council, then the result would have been favourable to the Wakf. Their Lordships tried their best to decide the case according to the Mahomedan Law and the whole of the Mahomedan community of India and elsewhere is extremely obliged to their Lordships for their desire to do justice to the Mahomedans on a subject pre-eminently Mahomedan in its character. Their Lordships do not say that on account of public policy being against perpetuities they would not follow the Musalman Law if it favoured perpetuities. Further more, their Lordships do not read and construe the Mahomedan Law with a bias against perpetuities. In fact their Lordships entered upon the construction of the Mahomedan Law without any bias at all and without any predetermination to construe the Mahomedan Law from the point of view that perpetuities were abominable. They took the law as it stood and tried their best to give a proper construction to the law. But the

sources which were open to them were scanty and limited. There is no English work on Mahomedan Jurisprudence and I will show in the course of this Review that Mahomedan Jurisprudence is when compared to the Western Jurisprudence, as different as the East is different from the West. Their Lordships had before them the decision of that talented Judge Mr. Justice Ameer Ali, but his decision was not based upon any such learning as was derived from Mahomedan Jurisprudence so as to be considered sufficient to answer the question of the Privy Council against the Wakf based upon the inference derived from the law of gifts. But it must be said in justice to that learned Judge that his view of the Law of Wakf was perfectly sound and his view of the conclusive nature of authorities, as distinguished from reasoning based upon logical or juridical reasoning, was perfectly justified; although no doubt a non-Mahomedan Judge could not be much blamed for not giving the same value to those authorities in consequence of inability to attribute their force to the real sequence of argument.

8. In answer to the aforesaid Memorial the Secretary to the Central National Mahomedan Association on the 8th August 1900 received the following reply :—

(True copy.)

No. 3103G.

JUDICIAL DEPARTMENT.

FROM J. A. BOURDILLON, ESQ., C.S.I.,

Offg. Chief Secretary to the Government of Bengal,

TO THE SECRETARY TO THE CENTRAL NATIONAL MAHOMEDAN ASSOCIATION.

Dated 3rd August 1900.

SIR,

"WITH reference to your letter No. 576, dated the 8th December 1899, I am directed to say that the memorial from the Central National Mahomedan Association and its branches on the subject of Wakfs which was received therewith was submitted to the Government of India.

I am now to state, for the information of the Association, that the Government of India are not prepared to entertain the prayer of the Memorialists which is in effect a proposal that Government should legalise the settlement of Mahomedan family property under the name of Wakf. A law which would enable every individual member of the Mahomedan faith to make a settlement of this nature would be entirely opposed to the general policy of the Government of India in respect of the creation of perpetuities, and would in the opinion of that Government be unsuitable to the conditions of this country.

In regard to the conclusion of the Memorialists that the decisions of the High Court and of the Privy Council in recent years are opposed to the Mahomedan Law, I am to observe that it is open to them if so advised to bring another test case with the object of having these decisions reconsidered.

I have the honour to be,

SIR,

Your most obedient servant,

(Sd.) H. L. STEPHENSON,

Offg. Under Secretary,

FOR OFFG. CHIEF SECRETARY TO THE GOVERNMENT OF BENGAL."

9. As stated above, I have been emboldened by the recent decision of the High Court to review the law of Wakf. That decision has to my mind done in respect to the appreciation of the question of Wakf as it really stands under Mahomedan Law, a peculiar service to the Wakf question : it has so to say introduced the thin end of the wedge in the law as laid down by the Privy Council. And the whole of the law I now beg to place in a convenient form for public information.

10. From the above answer of the Government of Bengal it is quite clear that the Government did not appreciate the true position and value of the questions raised in the memorial, and if it did, then the present attempt to review the law of Wakf derives very great impetus from the said answer. What I mean to say is that the Government letter asks the memorialists to try another case. The evident meaning of this clause is that the Privy Council might in a future case reconsider the law ; and that if it has, as the memorialists say, misunderstood the law in the first case, *viz.*, that in 22 I. A. 76, then it might lay down the law correctly in another case. There have been other cases decided by High Court and the Privy Council after the one by the Privy Council in *Abul Fata* v. *Russomoy*, L. R. 22 I. A , 76, which last was decided in November–December 1894, and these cases are as follows :—

Phul Chand v. *Akbar*, I. L. R. 19 All. 211—decided in 1896 by the Allahabad High Court.

Muhammad v. *Rasulaw*, 21 I. L. R. All. 329—decided in 1899.

Mujibunnissa v. *Abdul*, L. R. 28 I. A. 15—decided by the Privy Council in November–December 1900, saying " at the present day it is not the law."

But the arguments contained in the memorial not having been published so as to be available to the Privy Council the result has been that the first decision in *Abul Fata* v. *Russomoy*, 22 I. A., 76 has always been affirmed by the later decisions.

11. I write this Review with a double object ; first of all, my object is that my arguments should be printed in a form accessible to the Privy

Council so that they may receive from the Privy Council that consideration which I pray for them. And secondly, my object is to draw the attention of the Government of India to the unsatisfactory position in which the law upon the question of Mahomedan Wakf stands. The position taken up by the Mahomedan community and the arguments advanced by that community in favour of the validity of the Mahomedan Wakf in the aforesaid Memorial, have not at all been refuted in answer to that memorial. In fact, the Government of India has postponed the consideration of the question for a more suitable occasion, and that suitable occasion has either now arisen, the Privy Council having in subsequent and more recent cases upheld its original view; or the occasion might arise in future when, if I am so fortunate that, the attention of the Privy Council might happen to be drawn to this Review.

12. But there is one condition which, I entreat, should be observed in perusing this Review, *viz.*, that the reader of this Review will be pleased to spare no pains to realise the arguments raised on the whole of the literature on the subject embodied in every portion of this Review including the arguments based upon Mahomedan Jurisprudence *i. e.* Osool and those based on Mahomedan Fikah or Law such as the Hedaya, &c., which latter arguments are to be found in the Memorial. The danger which I apprehend is this, that after commencing a perusal of this Review a sense of weariness might steal upon the mind preventing it from realising the meaning and value of the arguments used on the subject. In other words, if no pains are spared to master the subject, I have no doubt the result would be that every mind would come to the conclusion that my argument is correct in the same way as some of the judges of the High Court in the Full Bench came to such conclusion: so that I may be excused for saying that if any reader is inclined to differ from me he must *prima facie* attribute the difference to his indifferent reading of this Review and he must therefore begin again until he accepts the arguments or finds arguments leading to the contrary conclusion of equal strength from the same stand-point. I also express my willingness to spare no pains if any body were to ask me to wait upon him to explain orally what this Review amounts to and now I have to make one further suggestion, *viz*, the reader should, while proceeding with the Review have his eye on the Paper No. 1, being a list of the contents of the paragraphs of the Review (see p. 111*n*) and go on marking the list whilst reading the Review. In this way the thread which runs through the Review should be perceived in a syllogistic reading of the same: any matter of detail connected with any proposition shewn in the list and Review, might be skipped over and postponed for the time being to recur to it on a second reading. I draw special attention to paragraph 15A. I have made the suggestions contained in this paragraph with all humility

and I hope the readers will take them in the spirit in which they are made *viz.*, an earnest desire to obtain a patient and not an erratic attention.

PART II.

Consisting of such portions of the Principles of Mahomedan Jurisprudence as are necessary to purge the mind of its preconceived ideas relating to what should constitute the first principles of legislation and to regulate its tone so as to make it fit to receive Mahomedanised ideas : being in fact axiomatic rules necessary to the understanding of the Mahomedan Law in general and of the Law of Wakf in particular.

13. The decisions of the Privy Council adverse to Wakf, are contrary to the Principles of Mahomedan Jurisprudence, in the following particulars amongst others :

(*A*) Worldly prosperity is not the immediate aim of Mahomedan Law : the principles governing the Rules of Shera are very different from those which form the common Law of other countries and govern the lines of legislation there.

(*B*) In all classes of disposition authorised for humanity by the Mahomedan Law, the effect is produced by a direct act of God himself, on the external appearance of the circumstances laid down in the Shera in that behalf : and such effect, it is not in human power to anticipate or prevent, by any means other than those known to Mahomedan Law.

(*C*) Intention, that is to say the real intention, meaning, the conception by the mind of the ultimate object in view, has nothing to do with Mahomedan dispositions, the only intention relevant is what may be called volition or exertion of the mind such as is necessary to attribute the act, to the individual : as in the case of Huzl or jest and Ikrah or compulsion, where parties go through the form of marriage without intending any marriage or even intending that there should be no marriage ; in such cases marriage comes to be validly constituted. This is far from opening a door, much less a wide door to fraud and swindling ; on the other hand the Mahomedan Law has a tendency to shut that door very firm and fast. So also in the case of Tuljeea (which will be subsequently explained). See Mira p. 276 and 2 Az p. 387, command (or Hookm) is the effect of mandate (or Khitab) from God in connection with the *acts* (*or Fail*) of (mookulluf or) persons liable to obligation, such mandate being compulsory (or Iktiza), or optional (or Ikhtear) or (by way of

Waza or) declaration. And intention is not an act (or Fail) but is a (hal or) condition of the (Kulub or) mind.

(*D*) According to the Privy Council, a Mahomedan Wakf, except when it devotes a major portion of the profits to the poor is void : but void or batil is something quite different according to Mahomedan Law. Whilst purporting to decide whether a Mahomedan disposition is valid or void under the Mahomedan Law, you cannot discard the meaning of those terms under that law and prefer their meaning under another law when the latter meaning is impossible under the Mahomedan Law.

14. The public knows what constitutes the foundation and the working of the machinery of Law amongst other nations : now I present the Mahomedan point of view and request a comparison. Assuming that I have made some head way and advance in explaining how commands are worked out under the Mahomedan Law according to the principles explained by me in Appendix A, p. 119*n* of Volume I of the Calcutta Law Journal, I submit that the following propositions are established from those principles :—

I. God's will being necessary in every case, that will must be invoked in every case by means of the Illut.

This is proved from the following reference to the said Law Journal p. 120*n*, paragraph 7 : Do. paragraph 8, &c., &c. All the principles of Mahomedan Law are based on the doctrines of preordination and predestination and the powerlessness of man.

II. As a corrolary from the above there must be some one to invoke and thus to provoke the will of God.

III. There must be some object with reference to which the Illut is invoked.

IV. The means of invoking must be such as are recognised by the Shera or such as God will take cognisance of in issuing its mighty mandate.

V. The invokation must be so that it should pass on to the object and must not be prevented from reaching the object and thus becoming premature and abortive.

15. Eliminating proposition No. I and arranging the above propositions in a rather different but more natural sequence and order, they stand thus :—

(I.) There must be capacity in the person who is desirous of exercising a right. (This is II of paragraph 14). In other words, as put in works on Jurisprudence, there must be Ahleut or capacity in the mover.

(II.) The mover must employ as means to move the will of God such signs as the Shera has fixed for the results to get

created by an act of God ; and such signs constitute the external manifestation of the Illut. (This is heading IV of the preceding paragraph.) In other words if the person so acting as aforesaid is desirous that a result should get produced in a particular dispostion, he must use the formula fixed for that particular kind or class of disposition. These formulæ are called Inshaat (or creative formulæ). For instance if a person having capacity or being Ahul, wishes that God should in a particular case produce the effect of sale in a certain transaction, he must use the words "I sell" and the purchaser must use the words "I purchase." Then God by his Almighty though invisible power creates ownership in the purchaser : So also in a case of Wakf. Thus the Ahul (or one having capacity) having used the formulae (other requirements having also been fulfilled) no power on earth could prevent the result from being accomplished ; if the human act failed to comply with the requirements of Ahleut and of other matters, no power on earth could produce the result.

(III.) There must be a mahal or fitting object towards which the Illut or creative cause, involved in the formulæ mentioned above, must flow from the *Ahul* or person having capacity to do an act. (This is No. III mentioned in the preceding paragraph). As an instance of absence of Ahul, may be cited the case of one who is *majnoon* or insane. As an instance of absence of mahal may be cited the case where the subject matter of sale is an impure thing, such as pork &c. Absence of Ahul and absence of *mahal* lead to the particular disposition being batil or absolutely void ; and the Privy Council has included within this category such of the Wakfs as have not met with their Lordship's idea of fitness of things : whereas instead of being void, those Wakfs are absolutely good, having inherent to them *Hoosn* or goodness instead of *Kubah* or badness ; this latter circumstance being an essential quality of what is *batil*. As an instance of violation of the principle involved in rule (II) might be cited the case where the formula is used wrongly, when the *Illut* ceases to get into action initially.

(IV.) The formulæ employed in cases of dispositions are either absolute, without any condition, or are expressed condi-

tionally. In the former case the *Illut* moves at once from the *Ahul* to the *mahal* and the effect arises at once. In the latter case the view of the Hainifites is that the condition, where it is authorised and justified, has the effect of preventing the *Illut* from coming into immediate operation, and that the operation of the Illut commences as soon as the condition is fulfilled. At any rate, one essential requisite for the production of a particular effect is that the Illut involved in the Formulæ expressed, must pass on from the Ahul to the Mahal, before the effect could be produced. This heading is identical with Heading No. V of the preceding paragraph *viz.* paragraph 14. (See Mira. p. 192) beginning with the words "the effect of a Tusurroof or act of the Shera, arises from three things": See also 2 Az. 157 &c. consisting of the words "because the Illut of Shera does not become Illut before it reaches the Mahul."

154. How I will work out the conclusion from the four propositions stated in paragraph 15 is this: viz., the conclusion I have to establish is that a Mahomedan Wakf such as the Privy Council has held to be void is valid according to Mahomedan Law and the steps to arrive at the conclusion are these:—

There are nine sub-paras. under this paragraph and they are all set out under paragraph 15A of the "List of contents of paragraphs of the Review" at p. 111*n ante* which please read here again: except that the references contained in sub-para. 9 are these *viz.* (see Mira. p. 277, 2 Az., 388; Mira. pp. 281 and 312, 2 Az., pp. 444 and 445.)

16. As regards item (I) of paragraph 15 aforesaid *viz.* Ahleut, the view taken by the Muhammadan doctors is of such a novel though no doubt sound a character that by no flight of imagination could a western jurist reach it or could deem it relevant for the purpose of laying down rules for the formation of conduct, and for the construction and continued existence of society. Ahleut or capacity (see Mira. p. 321 and 2Az. p. 434) depends according to the Muhammadan doctors to a certain agreement or *misaq* which took place between God and Adam. Whether the consideration was such as would bear the light of examination under rules of modern civilisation, it is difficult to say; certain it is that the Koran lends considerable support and establishes the fact of this *misaq*; and that is an incontrovertible proof of the fact and the jurists have upon that authority founded the idea of capacity or zimma of a human being. It is not necessary to enter into minute details with regard to this question of *misaq*. I only touch upon this subject from a particular point of view, and that point of view is completely

served by a short notice of the subject. At the beginning of creation three animated bodies, amongst created things, were brought into existence one having spirit and intelligence only, and this body consisted of the angels; the second class consisted only of matter without intelligence or spirit and this consisted of beasts or animals; there was a middle class which consisted of animated beings having both intelligence and spirit as well as body. Perhaps some mischief was apprehended by the combination of spirit and matter, and therefore there was a contract between God and Adam to the effect that Adam should accept God as the creator and as the sole object of Divine obedience and that God should grant to Adam and his descendants zimma or capacity of obligation for and against: for this reason, as soon as the *fœtus* in the embryo becomes instinct with life it acquires capacity or zimma even before it parts with its mother's womb; but the difference is that as long as the embryo remains in the womb in an animated state, it has zimma or capacity only for obligation (or Wujoob) in its favour, and not for obligation against it. That is to say, the zimma or capacity of the embryo consists of 3 or 4 things, *viz.* the right or capacity to inherit, the capacity to accept bequests and the capacity to have its nasab established. It has no zimma or capacity to have anything established against it. As an instance of this, the works on Jurisprudence mention the case of a sale in favour of a *fœtus* through the medium of a guardian, in which case it is said that it is the guardian who is liable for the consideration and not the fœtus. And after the separation of the embryo from the womb the infant obtains zimma or obligation both for and against him; and this state continues until it gets invested with intelligence or *Akl* and then it gets the zimma or capacity of Wajoob-i-ada or obligation to discharge: this is the idea of Ahleut or capacity according to Mahomedan jurists, so that whoever is an *Ahal*, according to Mahomedan Law, is entitled to make use of any of the classes of dispositions sanctioned by the Shera to be made available by an Ahl, no matter what is the particular class of disposition, whether it is of the nature of a gift or of the nature of Wakf involving perpetuity or of any other nature. Therefore for the Privy Council to lay down that a Muhammadan who has undoubted *ahleut* or capacity according to his law, should be deprived of the privilege of availing himself of any of the class of dispositions left open to a Mahomedan Ahal and expressly sanctioned by the Shera, is to overstep the bounds of a Cazee's duty and tresspass not only upon the functions of the legislature but also on the functions of the creator himself according to Mahomedan notions. Thus Ahleut or capacity in a Mahomedan consists of his possessing intelligence; but in accordance with the rule submitted before (see 1 C. L. J. p. 129*n* and p. 132*n*) intelligence being an internal sign and also a (batin or) internal matter, and being a vague and an indefinite idea, its place for practical

purposes is supplied by puberty or majority, that is to say *booloogh*. And this is what is meant by the rule in the Mahomedan Law that the limit of majority varies between 9 and 15 years unless the signs appear before, meaning thereby particularly the sign of intelligence though signs of puberty and majority are not excluded thereby. Under the Mahomedan Law, Ahleut depends on akl or reason and the latter depends on Buloogh or puberty, which is a certain striking event in male and female life. Under that Law, Sighr or minority is inconsistent with paternity and maternity or the capacity thereof. The striking event referred to above, shows the passing away of Saba or tender age, and marks the approach of Buloogh or puberty, and this latter fact is a sign that the light of reason has dawned. There is one uniform rule of majority for all purposes of Shera, including civil, religious and political.

17. In connection with item (I), that is Ahleut or capacity, there are various topics called awariz or disabilities. (See Mira. p. 326) and it will be necessary to touch upon only one or two of them in connection with the subject under review. The items of disability are classified under two heads. Sumawee or natural and mooktusab or acquired; and altogether they amount to these :—(1) Joonoon or Insanity; (2) Infancy or Sighr; (3) Atuh or a state of mind after puberty in which one acts sometimes with intelligence and at others not; (4) Nisyan or forgetfulness; (5) Noum or sleepiness; (6) Ighma or a sort of lethargy : (7) Rikk or slavery and absence of freedom; (8) Hyz or menses; (9) Murz or sickness; (10) Mout or death; (11) Jehel or ignorance; (12) Sookr or inebriation; (13) Huzl or jest; (14) Sufha or a modification of No. (3); (15) Sufur or journey; (16) Khata or slip of the tongue; (17) Ikrah or compulsion. Of these No. 13 or jest will be touched upon later on as illustrating the principle that Mohamedan Law deals only with signs and attaches an effect to signs in a way it is impossible to imagine under any other system.

18. As regards No. (II) of paragraph 15; this is a most important item in the practical working of the machinery upon which the Mahomedan Law turns. In fact it is the lever or fulcrum on which the machinery acts. In 1 C. L. J. p. 120*n* paragragh 7 I have pointed out the importance of Illut and the place it occupies in the Mahomedan Law and its position in the production of results both in this world and the world to come. At p. 121*n* paragraph 10 of the same Law Journal, I have stated that the *Illut* must be clear and definite and not vague or ambiguous. This clearness and definiteness, as I have shown there, is, when the Illut is hidden, accomplished by providing a recognised substitute for the hidden Illut. If a person is desirous that Wakf should get created how is he to do it: and the question for discussion in connection with this head as relevant to the law of Wakf, is whether there is a formula or *Insha* for the creation of a valid

Wakf on behalf of God, on that formula being invoked by one who is *Ahal* or having capacity according to Shera, that is to say, sui juris. It may not be necessary for me, regard being had to what has been laid down by the High Court in the last Wakf case referred to above, to labour much on this point, because, as I have said in part I. of this Review, paragraph 3, that the case of *Mofazzul Karim* v. *Mohammed* (1) establishes the following proposition at p. 171 of the Report, where it is said that "it must be considered, therefore, that there is a considerable body of authority in support of the view that the profits of land apart from the land itself cannot be the subject matter of a valid Wakf; *and the analysis of juristic ideas upon which it is founded, appears to be this: the contract (Akd) in relation to transfer of property may deal either with the ayn or the monafa; if it treats of the former, (ayn) it may be without consideration, and may take effect either at once (Hebba or gift): or take effect upon the death of the owner (wasiat or will); or it may be with consideration, either in the shape of spiritual benefit (Wakf or endowment), or of temporal benefit (Bai or sale); if it treats of the latter (monafa), it may be either for consideration (Ijara or lease) or without consideration (Ariat or commodate loan).*" I have said before, this case takes a very important advance step in regard to the true appreciation of the principles upon which the Law of Wakf is based. The meaning of the ruling is this, that in the same way as sale and gift and Ijara and other transactions are allowed in Mahomedan Law, so is also Wakf allowed by that Law; that is to say, as in sale, the formula used in effecting the sale, is sufficient to move the will of God to create rights consistent and connected with sale, *e.g.* right of possession and right to demand consideration, so also in Wakf is the formula connected with Wakf, *viz*, *Wakafto* or "I have made Wakf," sufficient to move the will of God to create the effect and produce the result involved in the formula just mentioned in regard to the creation of Wakf. If that is so, the Wakf to the fullest extent recognised by the Mahomedan Law, gets created by the sanction of God himself, totally unaffected by any regard to the question of perpetuities which find no place in the Mahomedan Law and which do not control the extent and character of the sanction accorded by God to a Wakf. To make it clearer, the Shera has laid down the extent and character of what an Indian Wakf could be. *It has also laid down that God has commanded that if the ahal should use the word "Wakaf to" or the formula involving the Illut, with the necessary conditions, then God will sanction the Wakf to the fullest extent and character defined above.* Where is then there a place in Mahomedan Law for limiting the Wakf to a gift specially to the poor in the *way their Lordships of Privy Council have done*? In the face of the clear provisions of the Mahomedan Law, Mr. Justice Trevelyan at p. 207 of the Full Bench case of *Bikani Mia* (2), says "I use the word 'charitable' in the English sense as that is the sense in which it

(1) (1905) 2 C. L. J. 166. (2) (1902) I. L. R. 20 Calc. 116.

is used in the decision in English Courts and the translations into English. We have been requested to use the word 'charitable' in what is called the Mahomedan sense *i.e.* to use a word in another language which may mean another thing." I might stop here with the conviction that I have made out my point to be found at the beginning of this paragraph, and beginning with these words :— "Whether there is a formula or Insha for the creation of a valid Wakf as on behalf of God &c. But inasmuch as the subject is of considerable importance, to remove all scepticism from the subject I make this Item (No. II) more clear in the way in which it is discussed in books on Oosool-i-Fikah."

19. On a reference to 1 Calcutta Law Journal p. 123*n*, paragraph 12, item No. 10, and to p. 134*n* of the same Volume, paragraph XIV, it will appear that certain human acts have certain effects which follow as the results of those acts by the will of God. Those human acts are *Illat* or you may call them *Sabab*, because the latter term is sometimes used to indicate, in general, what may be in the nature of signs, marks and indications, by which the will of God is identified and recognised in respect to his commands in regard to the nature and effect of those acts. On a reference to p. 122*n* paragraph 12 of the said Volume and p. 132*n*, paragraph 1 and sub-paragraph under those paragraphs, it will appear that of the things referred to there as constituting Sababs for certain effects, most of them are other than human acts. In fact, the last items, in those 2 paragraphs., *viz*, item "tenth" at p. 123*n*, and item "XIV" at p. 134*n*, are the only items which declare that certain human acts are Sabab for certain effects. Such human acts which are designated as Sabab, are called "Tasarroofat" or dispositions of the Shera ; the effects thereof are called Ikhtisasat or particular results provided for by the Shera. Now if there is a Tasarruf-i-Sharai, that is, an act which the Shera recognises as having been predestined and preordained to lead to a certain result then that act or Tasuroof-i-Sharai must, as I have already submitted, lead to the particular result, for if it fails to do so, very serious consequences in regard to the attributes of Providence follow, and then by a chain of reasoning which is not necessary here to pursue, Providence must be convicted of having been either false or impotent. It is clear that the recent decision of the High Court referred to above, recognises that the particular Tasaroof or act which creates Wakf, is a Tasaroof-i-Sharai or legal act ; and the above analysis of the division of human acts also leads to that conclusion. Thus therefore there can be no doubt in regard to the correctness of the conclusion that the *Insha* or formula by which Wakf is created is authorised by the Shera (as I have submitted in paragraph 18) and that the Shera is not based upon the trammels of civilised life, but that its principles and rules are based upon a consideration of Sawab or future reward : and therefore when Sawab results from a certain transaction, that transaction, is sure to have the sanction of the Shera and that is the subject of the following paragraphs.

20. I have submitted in 1 Calcutta Law Journal p. 119*n*, Appendix A paragraphs 2 and 5, that commands are of two kinds; declaratory (or Wazai) and mandatory (or Tukleefee). The necessity which led the Mahomedan Juristis to make the division of commands and obligations into the two classes mentioned above, is set out in a separate paper which is entitled Appendix A to this Review. To incorporate this Appendix in this Review would break the thread of the argument and would involve a long digression from the principal point I have immediately in view, *viz*, that the whole of the Mahomedan Law is based on the theory of Sawab or future reward.

21. I make out my proposition that the effect of a legal formula is to create a right, also in the following way. No doubt Wakf, like sale, is only a Moobah or a permissible act as contradistinguished from a compulsory or Wajib act; that is to say, there is no doubt it is simply optional in the sense that abstinence from Wakf leads to no pain or detriment in the future world: but still it must be remembered that although Wakf is not Wajib, there is a striking peculiarity connected with it, *viz*, that the term Wakf itself imports Sawab, the basis for the transaction and the consideration for it being Sawab: there is no other human disposition which enjoys this peculiarity. Wakf has therefore a special aptitude and fitness for Sawab. But is there no other way of connecting Sawab with it? Viewing it apart from its peculiarity as importing Sawab by itself and considering it as situated on a similar footing with other dispositions such as sale &c, does it not enjoy Sawab in common with other optional dispositions involving apparently only absence from future pain and not apparently involving the positive idea of future Sawab?

22. I will now examine the proposition dealt with in the last words of the above paragraph; *viz*, viewing Wakf apart from the special Mandoob character which attaches to it and viewing it only as optional in common with other optional human dispositions such as sale, mortgage &c.—is there no ground for supposing that according to Mahomedan Jurisprudence, Wakf with other optional dispositions, carries with it the idea of Sawab? The answer to the question is in the affirmative, viz, that there is such a ground. All dispositions of the Shera import Hoosn or future reward; and that for this reason: *viz*., that all dispositions of the Shera are included in the class of commands called commands of Wazai or declaratory commands; and that Wazai commands are founded on Sawab in the same way as Tukleefy commands are so founded.

23. I make out these two propositions expressed in the last words of the above para. in the following way:—At p. 312 of the Miratool Oosool, 2 Azmery p. 444 as commented on by the following division of a Muhkoom-i-bihi or a human act authorised and recognised by the Shera is set out; the Arabic passages from 2 Az. p. 444 and other works are set out in the form of an appendix called appendix B for ready reference and comparison.

A. A human act authorised or recognised by the Shera, Muhkoomibihi, must have actual existence because Shera accords to some of those acts certain qualities and attributes, which could not be accorded to them unless they had actual existence: therefore the first division is whether such human acts, having actual existence recognised by the senses, have legal existence or not; the second division is whether either of those two classes is itself a Sabab or means for a legal command: thus altogether recognised human acts (Muhkoom-i-bihi) consist of four classes:

A1. Those acts which only have (Wajood-i-Hissee or) existence cognizable by the senses but have not attributed to them a legal position and quality and *which are Sabab, or occasions* and causes for other legal effects: *e.g.* zina or whoredom: it is huram or unlawful and is the Sabab for another legal effect *viz.* Hud or punishment.

A2. Acts which only have (Wijood-i-Hissee or) existence cognisable by the senses and which have attributed to them a legal position and quality but they are *not Sabab or occasion and cause for another legal effect: e.g.* eating which is sometimes Wajib or obligatory and sometimes Haram or prohibited and it is *not the Sabab* or cause and occasion for the foundation of another legal effect.

A3. Acts which have Wajood-i-Sharai and have attributed to them a legal quality or position and *constitute the Sabab* or cause and occasion for the foundation of another legal command: *e.g.* sale; because it has Wujood-i-Hissee (or existence taken cognisance of by the senses), and it has also a legal existence, that is to say, it is Moobah or permissible and it is the *Sabab or cause of (milk or) ownership.*

A4. Such acts as have a legal existence and have attributed to them a legal quality and position but *are not Sabab or* cause for another legal effect: *e. g.* Salat or prayers; because they have (Wujood-i-Hessee or) existence cognizable by the senses and also legal existence having the character of Wujoob or obligatoriness attached to them; and *are not Sabab* or cause and occasion for another legal effect.

B. It will be noticed from the above that an act which is merely *Mobah* or permissible, such as eating and sale, is either the cause or Sabab of another legal effect or not: for instance eating under ordinary circumstances, quite regardless of the occasion when it becomes obligatory or gets prohibited, is only a permissible act, and when it is only a permissible act, it is not the cause or Sabab of another legal effect. Therefore eating when only permissible, has not the quality of goodness or badness attached to it, because, a mobah or permissible act, is one in the doing of which there is no Sawab or future reward, and in abstaining from which there is no Azab or future punishment. But this peculiarity in mere eating *i.e.* its absence from Sawab and Azab, does not affect my proposition that in all cases of com-

mands there is either Husn, that is goodness, or Kobah or badness. The other Mobah or permissible act, *viz*, sale standing by itself has no Sawab or Azab attached to it being only a permissible act. But when it becomes the Sabab *i.e.* cause and occasion for another legal effect, then by virtue of the amar or command which makes it a Hookm-i-Wazai or declaratory command, it gets the quality of Husn attached to it. *In other words, a Mobah or permissible act standing by itself may not have the quality of husn and qubah or goodness and badness in it, but when it becomes the foundation or Sabab and occasion for another legal effect, such for instance as ownership in the case of sale, then that Mobah or permissible act acquires the quality of husn.* After sale it is necessary for the vendor to surrender the property to the purchaser. If he does so, he fulfils his duty and therefore the original act *i.e.* the act of sale, gets reflected with *husn* or goodness. *The conclusion therefore is that when Wakf, even if it be assumed to be an act which one is at liberty to do or abstain from, becomes the Sabab or cause of a certain legal effect, it acquires the quality of goodness or husn.*

C. The Subub for Wakf is Sawab, by means of feeding human mouths, be they of the poor or the rich: the Illut of Wakf consists in certain appropriate words used by the Wakif, as for instance, "I have made Wakf." After the Wakf has been constituted it becomes itself the Sabub or cause of other things, as for instance, the right to be fed and so forth. I have submitted in Calcutta Law Journal Vol. I, p. 120*n*, paragraphs 6, 7 and 9 that God is actuated by principles of Hikmut or policy. But I have also stated at p. 127*n* of the above Journal, paragraph *B*, that the wisdom or policy might relate to the future world or to this world. That the Muslihat or policy which relates to the present world does not imply the negation of goodness, or badness (husn or qubah) from the point of view regarding the other world, is quite clear from what follows.

D. The proposition that a declaratory command or Hukim-i-Wazai imports *husn* or goodness, is proved at p. 66 and 68 of Miratul Oosool and p. 291, Vol. I of its commentary Ajmery, extracts from which and some other books supporting the point above stated are given in appendix B annexed to this Review.

E. Now it remains for me to establish that *husn* and qubah (goodness or badness) used in the Shera in reference to command and acts, mean only Sawab or future reward and Azab or future punishment. As regards this proposition, there is no doubt according to the authorities; and every book on Jurisprudence, demonstrates it logically and philosophically. The Miratul Oosool deals with it at p. 304 and 63, and the Azmeree deals with it also in its comments. The Musulumussuboot deals with it at p. 53 &c. The discussion is a very lengthy one and it is not my object to encumber this Review by entering into details upon the subject of *husn* or qubah. *Husn*

and qubah (goodness and badness) have three or four meanings, but it is only necessary to refer at present to only one or two meanings. Frst they mean the quality of excellence and defect. Secondly, the quality of aptitude and fitness to promote the ends of the world, and aptitude and fitness for the reverse. In these two senses, husn and qubah are never applied to human acts by the Shera. The first sense of the words is illustrated thus, knowledge is husun : ignorance is kubah. In the second sense, the whole of the civilised Western communities use the word *husn* and qubah to form the basis of their jurisprudence and legislation. But as I have submitted, that meaning of the words forms no part of our Jurisprudence, but is carefully and expressly distinguished and proscribed from the Mahomedan Jurisprudence. In our Jurisprudence the foundation for all commands is *husn* or *qubah* in the third sense of the terms, and that is this, *viz*, the sense of praise by God and of future reward by him. It is in this sense, and in this sense alone, that Mahomedan Law uses the terms *husn* and *qubah*, and we must also mark the deflection of the lines of discussion. There are three sects whose views are discussed in our book ; the views of the Hanifites, the Motazalites, and the Shafacites. In the third sense of the term, the question with which the Mahomedan Doctors of Law were concerned is this. They were all agreed that the imperative form carries with it the notion that the acts to which it relates involves the meaning of goodness and badness in the sense of future reward and punishment: but the difference is this : does God by his command create Hoosn and Koobah in those acts for the first time by means of his command ; or does he merely affirm the pre-existing goodness or badness : the Hanifites say that Hoosn or Koobah is Zatee or appertaining to the essence of a thing and God issues a command, positive or negative in accordance with the already existing quality of Hoosn and Koobah in the act ; because human acts like herbs possess inherent virtues : Sikmoonya is purgative in its very nature : if God were to introduce for the first time the quality of Hoosn and Koobah by his commands, then that would be the act of a tyrant, for people were accustomed to zina and if there was no inherent vice in it why prohibit the same. Another sect, *viz.*, the Shafacites otherwise called the Asthairahs says, God is all powerful and whatever he commands to be done has the quality of Hoosn introduced into it for the first time by virtue of his command; not that because a thing was already good therefore God has commanded it. The Moosullumoos Suboot says, improving on the first view that "the Motozalites and the Imameas and the Kurrameas and the Brahmins go so far as to say that whatever has Hoosn or Koobah in it, that is obligatory," whether there is a command or not; but we the Matoodreedees and the Hanifites maintain that except in regard to very clear and crude principles such as the existence of God, God must send Dawut or a mission to inform us of what is Hoosn and Koobah and it is then alone that we can trace the Hoosn and Koobah of acts : thus different functions

are assigned to Aki or intelligence or reason by the different creeds. It is not necessary to pursue the matter further : I have proved that the whole of the Mahomedan Law proceeds on the basis that *the imperative form, whether positive or negative, presupposes that the act to which that form relates has the quality of future reward or future punishment ; and I have also shown that Wakf being a Hookm-i-Wazai, it is connected with, if not constituted by the imperative form and therefore partakes of and involves the character of Hoosn.* That Hokm-i-Wazai is connected with, if not actually included in the imperative form is shewn by extracts from Arabic authorities in the same Appendix B which is referred to in paragraph 23 above.

24. I think I will be able to demonstrate, by way of mathematical proof, the correctness of the proposition I have submitted ; *viz.* that in regard to the institution of Wakf when the Illut or, in other words, the formula "I have made Wakf," is used by one who is Ahal and proceeds from him to that which is Mahal according to Mahomedan Law, and there is no interruption in the cause or the Illut in its journey towards the Mahal, then the command of God follows to the effect that the Wakf is binding. If the conditions regarding the fitness of the Ahal and of the Mahal, and the passing on of the Illut from the Ahal to the Mahal, are fulfilled, then the effect follows with unerring precision. This peculiarity of the Mahomedan Law might be likened to a mine laid with a fuse attached to it ; as soon as one who is Ahal applies fire to the fuse, and the fire so ignited in the fuse travels on without interruption to the Mahal or mine, the explosion is bound to follow, whether the person setting fire to the fuse has an intention to explode the mine or not. Intention on his part is not necessary ; only volition is necessary. It has now and then been said, that Mahomedan Law encourages swindling and fraud. I will be able to show that it has no such effect : on the other hand, swindling and fraud are to an inveterate degree the concomitants of institutions other than the Mahomedan Law which has a heavenly simplicity about it.

25. These two matters, *viz.* that the whole of the process upon which the practical working of the Mahomedan Law depends, is, based upon the impact of the Illut on the Mahal and that Mahomedan Law does not encourage swindling or fraud, are made out in the following way ; and therefore the following illustration also serves the purpose of establishing the validity of a Mahomedan Wakf.

A. Take the case of Hazal or joke and jest. If what I have stated as the result of the comparison of the explosion of the mine be correct and if I am right in saying that intention has no effect whatsoever in Mahomedan dispositions, which depend only upon the existence of an Ahal, a Mahal and the impact of the Illut on the Mahal, then I must consistently with my argument make out a case in Mahomedan dispositions analogous to the case of one who fires the fuse without intending to explode the mine, but the

effect of his action is that the mine does get exploded. I have got such cases to prove my point up to the very hilt. Suppose an *Ahal* (a male Mahomedan) addresses a Mahal (a female Mahomedan), using the words "I marry thee," and all conditions of marriage are fulfilled, but suppose either party has no intention of actual marriage, or has a positive intention against marriage, what should be the result? According to those who give effect to intention, there is no marriage, but according to my contention, there is marriage under the Mahomedan Law for the reasons already stated. It may be that in this case the party contending for the effect of intention as essential to a transaction may not go so far as to say that in the case supposed marriage is not established, though that party can assign no reason for their conclusion. But if they were to search in their hearts for the principle of the rule where intention is to have effect and where not, then they will not be able to hit upon a rule fairer and more consistent with commonsense than the rule propounded by the Mahomedan Law, *viz.* to allow external circumstances and signs to have effect according to the Illut. So also in a case of divorce in which the formula is pronounced without intention, or with the contrary intention the divorce takes place most effectually without the intention or with the contrary intention. What is the rule in these cases?

B. The rule referred to above, is discussed in works on Mahomedan Jurisprudence in connection with Hazal, of which I will be able to give here only a brief summary: such books for instance, are volume 4 Kashfi-Bazdavi, p. 357; Miratul Oosool p. 351; Hussami p. 158: from these works it would appear that Hazal or joke is only partially recognised by the Mahomedan Law, that is to say, it is recognised only so as to be consistent with and regulated by the dictates and rules in connection with the Illut and the effect which the Illut produces in dispositions; and never inconsistent with such dictates and rules. The word "Taljia" is also used in connection with Hazal, as implying much the same thing, though connoting a higher and a more general idea. The nature of Hazal is this. Two persons in plain and clear words and in unequivocal language express themselves as follows, before and not in the course of a transaction; "we shall seemingly and only apparently say for instance, we sell this property one to the other, but in reality it shall be no sale, as between us;" or the husband merely for the sake of appearence and only seemingly says "I will divorce you, but the divorce shall have no effect and we shall remain husband and wife as before." This illusory agreement is called "Tawazo." If analysed, it means this, we shall, by our volition or Iradat use the formula which is assigned for the purpose of making the Illut to create a certain effect; but we do not consent (or Ruza) to the effect (or Hookm) of the formula. In other words, both the consent and volition or Raza and Iradat attach to the Illut, but not to the effect as to which consent or Raza is wanting. This agreement is valid only to

an extent consistent with other portions of the Mahomedan Law, dealing with the effect of the Illut and its impact on the Mahal. If the particular case in reference to which the parties have agreed is a case in which the Illut cannot be prevented from passing on to the Mahal, then the agreement is of no force whatsoever, and in spite of the Hazal, the Illut takes effect and the command comes into operation in due course. Such for instance as marriage and divorce, where there is nothing to prevent the Insha (or formula) of the Illut from passing on to the Mahal; and therefore the Illut takes effect and the marriage and divorce are operative, and the words of the agreement, saying that the Illut would not be productive of the effect, are a nullity. But when it is allowable by the law quite independently of the secret agreement, for an Ahal so to use the Illut as to prevent its immediate transference and approach to the Mahal, there the agreement above referred to is allowed to prevent the Illut from having immediate effect only to the extent to which the Illut could be prevented by other recognised rules from reaching the Mahal. And this recognised rule has reference to the effect of condition or Taleek; so that if the agreement is consistent with the rules relating to condition, then it is valid only so far and not further. The natural effect of a condition is thus illustrated: for instance, a man says to his wife, "you are divorced." The divorce takes effect immediately. But if he says "if you enter the house then you are divorced," there the divorce does not take immediate effect but is postponed to the time when the entry in the house takes place. Thus the condition postpones the time of the operation of the Illut. A man says "I sell this property to you," the other man says "I purchase," the sale is immediately contracted. There is a very learned and keen discussion in works on Jurisprudence on the way in which a condition juridically operates, whether the condition operates on the effect and prevents the effect from taking place, or whether it operates on the Illut and prevents the Illut from acquiring the importance of an Illut, so that the words of the Insha pronounced are deemed, to all intents and purposes, as not pronounced during the pendency of the condition; and the Illut during that pendency remains in a state of torpor or, more correctly speaking, in the state of natural negation (adam-i-aslee); because the natural state of all things is absence of existence, inasmuch as before creation there was negation or adam. Without going into this learned disquisition I say that the result is that in so far as sales are concerned the only condition to which it is susceptible is that of kheyar-i-shart, that is to say, condition of option which lasts for three days, after which time it becomes absolute and then its operation commences from the beginning of the contract; and this latter point distinguishes Illut from Subub. Kheyar-i-shart or condition of option being

allowed and recognised by Mahomedan Law, the agreement in Hazal is only held valid to the extent to which kheyar-i-shart is valid in a case of sale and is allowed to have effect only in such kinds of human dispositions as are susceptible to *Nuks* or defeat or recission in the way shewn above, and those dispositions are sale and Ijara. What is the precise extent of the operation of the secret agreement, it is not necessary to discuss here. The Mahomedan jurists have divided human dispositions in relation to Hazal into three classes. First, Insha-i-Tasarruf or formula of disposition. Secondly, information or Ekhbar in regard to a Tasarauff or disposition. Thirdly, those acts which refer to belief, or Aitkad. The jurists have discussed each of these classes in great detail; and have subdivided the heads into two further subdivisions and have then sub-divided each of such subdivisions into four further minor subdivisions, but the real rule is that Hazal is not recognised in any case beyond that in which the operation of the Illut could be postponed and only to the extent to which such operation could be postponed. The ground of their conclusion is, as I have stated above, that the Hazil or party who enters into the particular agreement has his Iradat or Volition connected with both the Illut and the Hukm; but his *Raza or Consent* is not with the Hukm or effect with which only his Iradat or Volition is concerned; but both his Iradat or Volition and Raza or consent appertain to the Illut, that is to say, he sets the Illut in motion but pretends to postpone the effect, and this is not in the *province of man to do.* I may observe here that good and bad human acts are both done with the Iradat or Volition of God, that Volition being exercised on the Qasd or mental effort of man that an event should get accomplished; but although God's Volition is to be found in regard to evil acts, his consent or Raza to such acts is not found, and therefore he is not open to the charge that when he himself is the creator of what is good and what is evil, then why should man be responsible. The conclusion therefore is that Hazal, on the whole, illustrates the principle that the operation of the Illut cannot be prevented by any human means, and the partial exception in some cases of sale only serves to prove the rule.

C. Out of the disabilities mentioned in para. 17 there are a few more which illustrate and bear out the conclusion just now set out, and those few are Noum or sleep (5), Sukr or inebriation (13), Khata or slip of the tongue (16), Ikrah or compulsion (17). As regards sleep, the question is discussed at p. 330 of the Miratul Osool, and the conclusion is that sleep deprives one of the capacity for Volition (Iradat), and therefore the words used by one in sleep regarding sale or purchase or divorce or manumission and so forth have no effect on account of absence of (Iradat and Ikhtiar or) Volition and absence of faculty of exercise of

option or selection between any two things; that is so far so good, *viz.*, that one who is asleep and has no ability to exercise his powers of mind consisting of determination and Volition, is not able to set the train in motion: and therefore the Illut remains in the state of negation and is not set into action by the words so uttered by him.

D. The next item is sookr or inebriation (13). That subject is dealt with in the Miratul Osool at p. 349, and the author first states the two causes of inebriation, *viz.*, first, a cause in which the man himself is not at fault, as in the case of inebriation caused by the effect of medical drugs in the course of medication, and in this case the man's words regarding divorce and manumission and sale and purchase are to have no effect. But if, and this is the second class, the inebriation is caused by an intoxicating liquor (or Sharb-Moharrum) then in that case his ahleut or capacity is not affected, and he is susceptible of obligations and commands and he has capacity to make all dispositions whether they relate to words or to acts, such as divorce, manumission, sale, purchase, and others. The reason for the dispositions being effectual in such a state is, that the man has the capacity to set the train in motion. He is Ahal for all purposes, and his Ahleut does not become lost to him by reason of the inebriation. This is a case in point for more reasons than one. If a Mahomedan case involving this question came before a Judge who is not acquainted with the principles of the Mahomedan Law, how would he decide it? Again, compare the reasons which in the Mahomedan system of jurisprudence govern the rule which bear upon the dealings of one who is drunk as aforesaid, with the rules in a similar case according to other systems.

E. The next head is Khata (16); this subject is dealt with in the Miratul Osool at p. 358, and in Kashfi-bazdawi, Vol. 4, page 380 and 382. An instance of this is as follows:—A man intending to say to his wife "thou art seated," actually says by a slip of the tongue, "thou art divorced." The divorce takes effect according to us for reasons which I have already submitted, *viz.*, that one who is an ahal and has capacity, uses a formula which involves the Illut by which an effect is produced. The Shafaiteis have differed from us in this respect, and now mark the point of difference and the line of deflection. Both parties admit that if the train is set in motion by an Ahal, the effect will follow: We say that the man who set the train in motion is an Ahal although he used the formula by way of a slip of the tongue, and *that the expression was actually used by way of Iradut or volition and determination, though not with intention.* Therefore on the determination of his will by himself, God created the result. Shafai, on the other hand, says that the person who made the slip is in the same position as one who talks in sleep, and that as in the case of the sleeper, so here there was no determination or Qasd and volition or

Ikhtyar to use the words. We, on the other hand, say that Qasad or determination and intelligence are mental or internal (*i.e.*, batni) matters, and that the external substitute of these internal matters is the fact of the man being (Akil and Balig-or) intelligent and of age (see Kushf-i-Bazduwee, Vol. 4, p. 262, etc.), and these two circumstances show the Ahleut. The question is discussed at great length with great smartness and acumen so that no loophole is left for any possible hypothesis or alternative. But it is not necessary for me to go into the same with any degree of fulness. The effect of sale under such circumstanes is discussed, and how we succeed in establishing (Raza or) consent on behalf of the person who so unfortunately makes a slip, is discussed. My object is achieved, *viz.*, to illustrate the principle which runs like a continuous thread from one end of the Mahomedan law to the other, *viz.*, that Illut worked out at the instance of an Ahal has its effect quite regardless of the particular intention which might be in the mind of the individual.

F. The next head is Ikrah or compulsion. This question is discussed at p. 359 of the Miratul Osool, and the author first divides compulsion into two classes and deals with the question of Iradat or Volition in connection with those two classes, and he holds that compulsion does not deprive the person subjected to compulsion of his capacity as an *Ahal* or as one *Suijuris*, and does not deprive him of his volition, although the volition is exercised under certain circumstances in which he has the option of two alternatives. The words which he uses under compulsion are actually his own words, and in using them he only adopts one of two alternative courses open to him, and he accepts the course least injurious to him, and therefore ten acts specified in books, which include divorce, manumission and Nikah, are effective when done under compulsion. The sale by one under compulsion (subject to difference of opinion) is also good, only that it is Fasid; it is noteworthy that it is clearly laid down that Ikar or admissions made under compulsion are not valid; *and the difference in the case of disposition and in the case of Ikrar is a point in my favour and establishes the proposition that if the train is set in motion by a man under compulsion, it will move whether he was a consenting party or not; but other matters which do not depend upon the same cause as disposition, stand on a different footing, such as Ikhbarat (or information including admissions).*

25*A*. In 1 Cal. L. J., p. 128*n*, in para. 22, sub-para. *a* (2)—I quoted from Mira, p. 287, and its commentary 2 Az. 401 (see also 4 kushf—v—Bazdavee, p. 194) a rule regarding Illut, *viz.*, that one class of Illut was an Illut in name (Ismun) and meaning (mana); but not in effect (Hookom), and I cited the instance of Murzool Mout to illustrate the rule. Now I cite another instance of the same rule from the same authorities, *viz.*, the instance "of a dependent sale" (or Bye-i-Mookoof); this is a sale by a

Fuzoolee or Volunteer; to this sale, the name of Illut, that is, the appellation and designation or denomination as Illut, is opposite and correct although it is a transaction of sale by the Fuzoolee or a Volunteer in respect of property which belongs to another person (see Mira, p. 287, and 2 Az., p. 4011) because such a sale is (Wazaia or) designed for its effect (or Hookom) which is ownership; such a sale is also an Illut in meaning (or mana), that is (taseer or) effect, because it produces the effect of ownership, and that effect is produced at present; as the purchaser from the Fuzoolee becomes owner of the property, only that the right of ownership remains dependent on the permission of the real owner; so that if the purchaser sets free the slave (the subject of sale being a slave for instance), the freedom takes effect conditionally (on the transaction being ratified by the real owner), whereas if the sale had failed to establish ownership in the purchaser, his act of manumission would have been batil (or void) just as if he had granted freedom to the slave before the contract of sale. But this class of Illut is wanting in one particular, *viz.*, the same is not Illut in its effect (Hookom) because the Hookom or effect is postponed to the permission of the owner, but on the permission being accorded, *the effect comes into operation* (not from the time of the permission) but (Moostunudun or) referring back to the time of the sale and from the time of the sale; so that the purchaser takes the profits also; and the right of the real owner is not to be disregarded because such right is a (Manai) matter preventive of the immediate operation of the sale and could not be disregarded to his detriment without his permission. This rule is a very strong illustration of the principle which underlies Mahomedan Jurisprudence and runs thoughout, *viz.*, that when there is a fit Ahal and a fit Mahal and an Illut moving from the former to the latter, then the effect gets created by an act of God. Thus when the formula of Wakf embodying its Illut, moves from a fit Ahal to a fit Mahal, the Wakf gets created by a mandate from God likewise. (See also Baillie's Sub-Law, p. 218, Chapter XII.)

26. Proposition (No. III) as pointed out in para. 15 (see p. 129*n*) is in regard to the Mahal or subject-matter towards which the Illut proceeds from the Ahal by the use of the formulæ; every human disposition has a Mahal, *e.g.*, sale, Nikah, divorce, gift; Wakf also has a Mahal, and this must consist of the thing or Ayn from which the profits are to be applied. In sale the mahal must be pure, *i.e.*, other than pork, wine, &c. In Wakf, the Mahal must be subject to the above condition so that profits from it are capable of being applied towards objects calculated to bring sawab according to Mahomedan ideas. (See para. 17 &c. of the argument before the Full Bench to be found in the appendage to this review.) The Mahal must be what is capable of satisfying the idea of Takurroob and Koorbut (see para. 53, 54, 55, and 59 of the same). In para. 53 of Do. will be found what

is the Subub in a Mahomedan Wakf and what is the object, and a very high authority is cited for the propositions advanced. The Subab as regards this world is the benefit of the living (not only the poor), and as regards the world to come, the obtaining of Takarroob to and Suwab from God. That subub assumes the form of the Illut when the formula is pronounced by an Ahal towards a Mahal. Here all the elements of a legal Mahomedan disposition are found, *viz.*, the Subub, the Illut, the Ahal, the Mahal and the flow of the Illut towards the Mahal.

If the requirements of law are satisfied in regard to Mahal, then the Wakf is absolutely valid and binding by reason of an express decree issuing from God.

(*a*) I have already shown upon what principles Ahleut depends: I will now show upon what principles the Mahliut depends.

(*b*) The Mahal of an act is the object towards which the action is directed (see p. 192, Miratul Osool; see also p. 129 Do.). In the act of husband divorcing his wife, the wife is the Mahal: in the case of a sale, the subject-matter sold is the Mahal and not the consideration. If the Mahal is a thing, so that a human act in reference to it obtains the quality of goodness or Hoosn in its essence, then no doubt the Mahal is fit. It is not necessary to discuss minutely the nature and division of Hoosn or goodness: but I may state shortly that Hoosn consists primarily of two classes, *viz.*, Hoosn in itself or essential goodness, and Hoosn on account of connection with something which has Hoosn; that is derivative Hoosn: the former is called Hoosn-la-Ainihee and the latter is called Hoosn-i-laghair-hee. There can be no doubt that the Mahal or object of Wakf, *viz.*, the Ayn of a thing which is pure and capable of forming the subject-matter of legal disposition is a Mahal having Hoosn or goodness in it, meaning always by Hoosn what produces good in the world to come and not what subserves and promotes the interests of this world including the interests of the commercial community. We are concerned with this world only in so far as it is a means to an end. The right conclusion therefore is that the institution of Wakf is an institution perfectly valid and by no means open to any of the slightest objection, and it would be an insult to Mahomedan feelings and instincts, and an outrage to its jurisprudence to suppose that a Wakf under the Mahomedan Law can, by any possibility, be void according to that Law.

(*c*) It is necessary to show what void or Batil means under the Mahomedan Law, in order to establish that a Mahomedan Wakf is not so. Koobah or badness has its divisions as Hoosn or goodness has. A thing might have Koobah or badness in its essence (Koobah-la-Ainhee) or it may have badness on account of something else (Koobah-lai-ghairhee), and that something else is either its quality (Wusf) which cannot be separated from it, or its adjunct (Moojowur) which can be separated. This matter is to a

certain extent, discussed in Mahomed Yusoof's Tag. Lec. Vol. 3, Appendix p. IX, XLIII, XLIV. As I have stated elsewhere, three or four things are necessary to constitute a legal disposition; one of them is the Ahal himself, and the other is the Mahal itself; if there is disability in the Ahal or Mahal, the transaction is Batil or void: an example of the former is insanity of the contractor; also when one says his prayers without purification, he is not Ahal for the purpose and his prayers are batil or void: an example of the latter is where the subject-matter of sale is not property, *e.g.*, where it consists of Mozamem and Molakeeh, things still in the back or loins of a male camel or within the producing capacity of a female one; and Khumur and Khunzeer, wine and pork; these things are not Mal and therefore could not constitute the Mahal of a sale or a Wakf. But instead of there being a defect in the Mahal, the defect might be in something else not being the Mahal itself but being something connected with the transaction and not being essential to the transaction, such as consideration for a transaction, the consideration being only a condition and not Mahal. This is a most important illustration in connection with the caution which Western minds should exercise in dealing with Mahomedan questions; although the existence of consideration is necessary for a sale which is exchange of property for property, still the passing of the consideration is not necessary to the validity of the sale. Absence of consideration is a minor defect; it is not the Rookn or Pillar of a contract but the Wuseela or means towards it (see Mira, p. 76). Such a formal defect, *i.e.*, one which does not relate to the Arkan or Pillars, Shurayit or conditions but relates to a quality or Wusf is called Fasad and the contract is called Fasid, *e.g.*, sale for the consideration of Khumur and Khunzeer. It will be noted that the same Khumar and Khunzeer render the contract Batil if they are themselves the subject-matter of Mahal of sale; but when they form the consideration, then the contract is only Fasid (see 2 Az. 444). There are further developments in connection with Batil, Fasid, and Suheeh which it is not necessary to enter into here; as to do so would lead to more lengthy discussions regarding what is Sherayee and Hissee; this can only be properly done in a different form of work. But the difference between Batil and Fasid is so important in practical life and so relevant to the Wakf question under consideration that I have touched on it very shortly in the form of an appendix entitled, Extra Appendix, marked No. 6B. Baillie and Ameer Ali have both made mistakes regarding the conception of the idea. Mr. Baillie was the originator of the mistake and Mr. Ameer Ali was the copyist of the mistake without acknowledging the originality of the mistake. In Baillie's Digest, p. 152-53, Baillie refers to 2 Inaya, p. 496, and misconstruing and misunderstanding the effect thereof, expounds the law in a certain way *viz.*

to lay down, that unlawfulness of intercourse depends on the permanent and temporary nature of the prohibition; this is wholly unfounded as held in the two sisters' case reported in I.L.R. 23 Cal. 156. Baillie, however, does not purport to translate Inaya 469 although he refers to 2 Inaya 496 for his proposition; but Mr. Ameer Ali thought Baillie had translated a passage, so that at p. 317 of 2 Ameer Ali's Mahomedan Law, 2nd Edition, he produces a translation purporting to be made by himself within inverted commas, but the passage turns out to be an exact copy from Baillie's with Baillie's mistake and misinferences (of which neither exists in the original), the inverted commas which do not exist in Baillie, and have been used by Ameer Ali to convey the idea of a fresh translation from the original. The correct translation of the whole of the page of 2 Inaya, p. 496, is given in I.L.R. 23 Cal. 156, and on a comparison in the course of argument in that case it was discovered that the following passage which is to be found at p. 317 of 2 Ameer Ali's Mahomedan Law, is not in the original Inaya at all but only in Baillie's book, *viz.*, the passage beginning with the words "with regard to women who cannot be lawfully joined together" and ending with the words "and therefore the connection is not zina" (see Mahomed Yusoof's Tagore Lectures Vol. 3, Appendix p. XXXI). I would have certainly abstained from referring to this matter after the authoritative decision of the point in I.L.R. 23 Cal. Series 156: but Mr. Amir Ali has obstinately repeated himself later on in 1897 when in his Student's Handbook (see. p. 50) he challenges the correctness of the High Court decision and thus indirectly challenges me as the author of the mistake. The point is relevant to this discussion and is important as relating to the fitness of the mahal. I accept the challenge and meet Mr. Ameer Ali by pointing out his error which he has merely repeated instead of doing what was necessary, *viz.*, explaining and justifying his view, and meeting my arguments in that case and justifying his illusory translation; he refers to the Futawai Alumgery to shew that an invalid marriage establishes nusub; but the question is what is an invalid marriage? Could the second marriage with a second sister, who is not a fit Mahal at the time, be said to be a fasid marriage, or is it not a batil or void marriage? If the mahal is not fit at the time of the marriage, the electric current in the shape of the Illut finds a non-conductor and would cease to act, and its action could not be revived or resuscitated by subsequent consummation. In works of jurisprudence, the failure of the action of the Illut is compared to the arrow shot from a bow: if the string breaks, the arrow falls and is not shot at all; if the arrow is shot but is intercepted in its course, it fails to reach its object. See 2 Azmery, p. 157, commenting on Mira, p. 192, where the second of the above illustration is given to shew how Illut is prevented from reaching its object by means of a condition attached to the Illut.

27. Item No (IV) in para. 15 has just been touched upon by the last few words of the preceding para. In regard to Wakfs the application of this principle is thus laid down in Baillie's Digest, 1st Edition, p. 556. "It is a condition that the appropriation be at once complete and not suspended on any thing." The meaning is that the Illut must operate at once because it is the index of God's will and such will must operate at once. There is a difference between a condition and a contingency as shewn in a passage at that page of Baillie. But it is unnecessary to pursue the matter further as my object is to shew that if a Wakf is validly created according to the rules of the Shera, then it does not become void according to the Shera by the fact that a smaller portion is devoted to the poor and a larger portion to the relations and connections.

28. Therefore a Wakf validly made under the Mahomedan Law cannot be void or Batil, and the P.C. has in effect though indirectly and extrajudicially repealed the Mahomedan Law not only in regard to Wakf but also as regards the import and meaning of Batil and Suheeh.

29. The Wakf objected to by the P.C. not being void according to Mahomedan Law it follows that when the party impugning the Wakf is not a creditor but an heir who derives his right from the Wakif or endower himself, the latter is estopped from disputing the Wakf in which consideration has already passed. The case in I.L.R. 30 Cal. 330 has, I submit, been wrongly decided, although the view taken by the High Court is in agreement with a case of the P.C. reported in L.R. 28 I.A. p. 15, and in 5 Cal. Weekly Notes, p. 177.

30. As regards the charge that Mahomedan Law has a tendency to open out a door for fraud and swindling, I submit, it has no such tendency. It purports to act on the apparent state of things quite regardless of intentions; the discussion of intention goes a great way towards widening the area of fraud and the introduction of uncertainty and conflict of decisions.

POWTHOO,

MAHOMED YUSOOF.

Dated the 22nd October, 1905.

Appendix A to this Review referred to in para. 20 of the Review.

1. PECULIARITIES OF MAHOMEDAN JURISPRUDENCE; RULES ARE DIVINE AND THE OBJECT IS FUTURE REWARD. POINTS A AND B.

The following constitute some of the points which distinguish the system of Mahomedan Jurisprudence from the system of Western Jurisprudence. In the latter the guiding rule and principle is to find out by

human rules and human ways what is best calculated to further the worldly prosperity of the community from a material and sometimes a moral or ethical point of view. In the former system the most striking features are presented by, amongst others, the following points:—

A—All commands including all rules laid down for human action are of divine origin.

B—The object of commands and rules is not to bring on worldly prosperity but future reward.

2. PECULIARITIES OF A AND B HAVE FOR THEIR BASIS RULES OF LOGIC, &C. POINTS C, CI, D, E, F, G, H, AND I.

The characteristics indicated by items A and B, in para. (1) have, for their basis, certain axiomatic and in other cases most acute and sometimes most perplexing and intricate rules of logic, metaphysics and divinity including philosophy: and those rules have been well established and truly proved in their proper place. Such rules converge, amongst others, on the following points:—

C—Doctrine of pre-destination and pre-ordination.

CI—Commands emanate only from God and not from man. To command is the essence of God and therefore man's reason is incompetent to lay down a command.

D—God alone has power to create a thing, and man has no power to do so. There is some scholastic difference on this point which it is not necessary to notice here.

E—To create is to bring into existence that which has no existence, *e.g.*, to raise one's finger.

F—To will an act does not amount to creating a thing; and therefore an exception is made in favour of man's powers of creation in reference to a thing which has no external existence but which exists only in the mind, such as ability or mind power to exert one's will; because this does not amount to creation properly so called, and it is therefore within the power of man to conceive an idea. Also the idea of relative position, as for instance above and below, which is technically called Hal. There is some difference on this point also, which it is not necessary to enter into here.

G—Man is responsible for his acts in future, although his acts are not created by him but are created by God, inasmuch as man has power to create determination by his will and exert it, and on the determination coming into existence God creates human acts. This, as stated above, does not militate against the exclusive power of God to create a thing. On the will of man being found

his determination follows, and on the creation of determination by man, it is the practice of God to create the act so willed and determined by man. It is in this sense that a man's acts belong to him and he is responsible for his actions.

H—That in the same way as chemical ingredients possess qualities which affect the human physical system, so do human acts possess in themselves and have inherent to them, properties which affect the human moral system, with a tendency to future reward or future punishment.

I—Except as regards very rough and elementary moral truths which are capable of being perceived and apprehended without instruction, *i.e.*, the existence of God, man is dependent on God for rules shewing what acts lead to future reward and what to future punishment; and generally speaking, except when God has laid down and provided for in such rules, man is not bound to observe a paticular course of action. On this principle the Hanifite Jurists say, different views are entertained by the Mootazilities, the Karrames, the Shias and the Brahmins as contradistinguished from the views entertained by the Hanifities and Shafeites.

The aforesaid rules bear on both the points A and B.

3. A, IN PARA. (1), REQUIRES PECULIAR RULES WHICH MUST BE FOUND OUT BY MAN IN ORDER THAT HE MAY KNOW THE WILL OF GOD.

The characteristic and peculiarity indicated by A in para. (1) must, from their very nature, require peculiar rules of interpretation and construction of language, and also including rules shewing the meaning of signs, manifestations and so forth, in order that divine wish should become known to man.

4. HUMAN WAYS AND MEANS FOR KNOWING DIVINE INTENTION. PRACTICAL RULES DEPEND ON THE THEORETICAL PARTS OF JURISPRUDENCE.

How are divine pleasure and will and divine intention to be known to man, so that man might be practically guided by such will, pleasure and intention in reference to his acts? In other words, how is man to make himself acquainted with divine intention, so as to make the same the basis and guide for his action in practical life? This is the great point which calls for the fullest attention in treating of the rules of Jurisprudence; because this is really the practical part of Jurisprudence. In order to find out a solution to this question it is necessary that the theoretical part on which

it depends, should be realised and grasped, because the practical rules borrow their hue and colour from the theoretical view, so that the theoretical rules afford the key to understand the practical rules.

5. THE PECULIARITIES OF MAHOMEDAN LAW DEPEND ON THE DIVINE NATURE OF THE RULES, PLUS THE EFFECTS OF THE PECULIAR STRUCTURE OF THE ARABIC LANGUAGE.

In dealing with Mahomedan Law, two things must be borne in mind, first, that the law is divine in its origin ; and secondly, that the two primary sources of that law, namely the Koran and the Hadees, are in the Arabic language, and are therefore, in regard to the mode of expression of ideas, governed by the peculiarities of that language.

6. THE SECOND PECULIARITY OF MAHOMEDAN LAW ARISES FROM THE PECULIARITIES OF THE ARABIC TONGUE.

But in addition to the peculiarities arising from the divine nature of the origin of the laws, there are also peculiarities arising from the Arabic language, which must be kept in view in understanding and interpreting the Mahomedan Law. The result is that the divine nature of the law and the peculiarities of the Arabic tongue, have both their influence on the Mahomedan Law, and both of them have invested this law with a peculiar character, with which the outside world is not generally very familiar. And this circumstance also raises a special difficulty in acquiring a mastery over the Law. These two circumstances have invested that law with a mysterious form, so that in trying to understand it both these matters should be kept firmly in view.

7. THE PECULIARITY OF THE TONGUE CONSISTS OF THE AMBIGUITY IN THE MODE OF EXPRESSING THE PRESENT AND THE PAST TENSE AND THE PECULIAR MEANING AND EFFECT OF THE FORM CALLED THE IMPERATIVE MOOD.

It is sufficient here to refer only to two peculiarities of the Arabic tongue for the sake of explanation and example. There is only one form for the present and the future tense ; to avoid ambiguity it is therefore necessary to use the past tense in reference to contracts and transactions. But the other peculiarity, which has so considerably affected the mode in which the Mahomedan Law is expressed, relates to the effect of the imperative form.

8. EFFECT OF THE IMPERATIVE MOOD.

Arabic idiom and etymology and the juridical view of the imperative mood, do not, subject to some difference of opinion, admit of general

rules and commands being laid down and expressed in the Arabic language in the imperative form, with the same facility, force and effect of universality as in other languages. According to the Arabic tongue the imperative form "Do this" spends itself by one single act, and is not capable of being understood so as to involve a repetition. "If you do this" or "whenever you do this" or the like formulæ are incapable of involving and expressing the idea of repetition. The only case in which repetition could be expressed in language is when the command or rule is made dependent on Illut or creative cause; *e.g.*, "If they commit zina then give them straps"; in this case zina is the cause; and therefore the repetition of zina involves the repetition of the command. When therefore the command is made dependent upon the cause, then, without any difference of opinion, the expression involves repetition; and it promulgates a rule to meet the case of a violation of that rule in every instance; this is so because by Ijma or concurrence of authority, it is laid down that the Illut or cause must have the effect to follow it immediately, so that it is not the imperative form which is susceptible of involving the idea of repetition; but the fact of the repetition of the Illut or cause, etc., leads to the repetition of the effect.

9. IN THE USE OF THE IMPERATIVE FORM, IF THAT FORM IS MADE DEPENDENT ON ILLUT OR COMPULSORY CAUSE, THEN AND THEN ONLY WOULD THE SPEECH INVOLVE REPETITION, NOT OTHERWISE. IMPORTANT RULE DEDUCED, VIZ., THAT AN OBLIGATION GETS REPEATED OWING TO THE REPETITION OF THE ILLUT OR COMPULSORY CAUSE. CASE OF HUJ.

The result therefore is that mere expression implying dependence on a quality or circumstance, which is a cause, does not express or involve the idea of repetition. "When I shall enter the city then I shall set free one of my slaves," refers to one act of entry only and to one act of manumission only. If the master says to his slave, "When you enter the bazar, then purchase so and so," the slave makes the purchase once; that satisfies the command. In case other than those where the command is referred to the Illut or compulsory cause, if repetition is provided for by Dalil or express authority, then no doubt repetition will be understood. The rule therefore is, when the Illut or compulsory cause gets repeated, then the obligation also gets repeated. The obligation to make Huj is not repeated more than once during a person's life-time, because the Illut or compulsory cause does not get repeated, there being only one kaba to receive respect; although that obligation is made dependent on pecuniary ability and facility. But pecuniary ability and facility constitute the

condition and do not constitute the cause of Huj; the cause of Huj thus being a solitary one, the obligation to make Huj does not get repeated by the repetition of the condition; because what calls for the repetition of the obligation is not the repetition of the condition but the repetition of the cause.

10. PRACTICAL RULES TO MAKE DIVINE COMMANDS UNDERSTOOD THROUGH THE ARABIC LANGUAGE NOTWITHSTANDING ITS DEFICIENCY.

I have shewn that the twofold difficulty in Mahomedan Law arises, first, from the divine nature of all commands which, in order that the same may be understood by man, must be expressed so as to suit human understanding and intellect; and secondly, that the peculiar technicality of the Arabic tongue renders it difficult that divine commands should be received and understood in a way so as to do away with all idea of signs and so as to be expressed only in language in the ordinary way, *i.e.*, the way ordinarily familiar to mankind. I now come to the practical part of Jurisprudence which deals with the mode in which man must understand divine commands through the vehicle of the Arabic tongue such as it is.

11. HOW TO FIND DIVINE COMMANDS FROM WRITTEN MATERIALS.

When the prophet was alive, any case which arose was solved by him, and the particular rule which applied to the case and the particular command which governed it was disclosed. Furthermore his lieutenants were sent to remote parts to explain the law. But in his absence and in the absence of the lieutenants, we must find out from written materials what divine commands are. What is the way to find them?

12. IMPORTANCE OF THE DIFFERENCE BETWEEN NUFS-I-WAJOOB AND WAJOOB-I-ADA, AND BETWEEN SABAB AND ILLUT.

The answer depends on the difference between Nufs-i-Wajoob or actual obligation, on the one hand, and Wajoob-i-Ada or obligation to discharge and act, on the other hand; between a Sabab or a material and foreshadowing cause and index, constituting premonitory symptoms and indications, indicating the existence of Nufs-i-Wajoob or the fact of an actual obligation, on the one hand, and, on the other hand, between an Illut or a creative and compulsory cause which provides for Wajoob-i-Ada or makes a demand for the obligation to discharge and act so as to perform and carry out the obligation shewn by the previous cause. Want of perception of the difference between the two ideas placed in contradistinction

and juxtaposition just as above, has contributed a great deal towards the misapprehension and misconception of Mahomedan Law. The reason for this misapprehension and misconception is that in every English rendering of the Mahomedan Law, Sabab and Illut are understood as convertible terms, and both are rendered and translated by the word cause or reason, whereas I will show that there is a world of difference between Sabab and Illut, and that the whole of the machinery of the Mahomedan law depends, to a very large extent if not altogether, on this difference.

13. THE NOTION OF SABAB AND ILLUT CONSTITUTES THE MASTER KEY OF THE MAHOMEDAN LAW.

The backbone of the Mahomedan Law consists in the idea of Sabab and Illut; and without appreciating the difference between the two expressions, it is impossible either to interpret Mahomedan law rightly and correctly or to provide for cases not especially dealt with by express texts or to understand the process by which such cases are provided for in the Ijma or concurrence of doctors and in the Kyas or reasoning by analogy. In fact the appreciation of the difference between Sabab and Illut furnishes a Master Key for the solution of all difficulties and for the opening of all the doors and recesses where Mahomedan law is to be found.

14. THE MASTER KEY IS HERE EXPLAINED, ALTHOUGH ONLY GENERALLY.

A detailed account of the difference between Sabab and Illut with full illustrations would be out of place here; but there should be a sufficiency to indicate their general nature and meaning together with their relevancy.

15. SABAB IS A MATERIAL AND FORESHADOWING CAUSE AND CONSISTS OF EXTERNAL OBJECTS, LAID DOWN AND PRESCRIBED AS INDICATION FROM GOD, IN REGARD TO HIS WILL AND INTENTION IN FAVOUR OF THE EXISTENCE OF AN OBLIGATION. DISTINCTION BETWEEN NUFS-I-WAJOOB AND WAJOOB-I-ADA. MEANING OF AHKHAM-I-WAZA. ILLUT IS THE COMPULSORY AND CREATIVE CAUSE OF DIRECT COMMAND TO PERFORM. ILLUSTRATION OF THE MEANING WITH REFERENCE TO THE DIFFERENCE BETWEEN A DEBT BEFORE AND AFTER DUE DATE.

It is shewn that a direct command from God is necessary to bring into existence even the most trivial thing or occurrence; man can create or bring into existence (and that only according to some of the schools) only

mere mental ideas, but not external things or manifestations, which must be brought into existence only by God. Man cannot transfer ownership from one person to another; he cannot create the relationship of husband and wife and so forth. All this result is by the direct creation and act of God. How does God show His divine will in regard to such creation? That is shewn by a Sabab or succession of sababs and by an Illut or succession of Illuts. Certain external objects, as to which there could be no mistake, are taken as indications of the will of God that those external objects viewed in the light thrown on them by the principles of Hikmut and Muslihut or prudence and wisdom, should convey a certain meaning to human mind. These external objects are called Sabab, or material and foreshadowing causes and indices; that is to say, pre-informing and pre-monitary symptoms shewing the presence of certain obligations without involving the idea that the performance of those obligations is demanded at present; they are mere indications of the fact of an obligation, without demanding any action to be taken for the purpose of performing that obligation and carrying it out. These Sababs are called Ahkam-i Waza or commands of position, that is to say, commands shewing that an external manifestation or circumstance has a certain position in relation to an obligation to act or not to act. These Sababs produce Nufs-i-Wajoob or actual obligation, as contradistinguished from an obligation to act or to perform. The obligation to act or to perform, of which these Sababs are mere foreshadowers and precursors or foretellers and forerunners, is to come in future. The Sabab only shews the present existence of a certain obligation without any command to perform it. It implies that a future command to perform will arrive, but it does not purport to issue such a command. Man may all the same perform the obligation without such a command, and then he will be discharged from liability by this anticipatory performance. If the performance shall not have been done when the time for performance or action comes, then there is a direct command to act or to perform, and this latter obligation is called Wajoob-i-Ada or obligation to perform and discharge and act up to the obligation foreshadowed and foretold as above by the Nufs-i-Wajoob. For instance, a person owes a debt payable, say, in three years; before the debt is due, there is Nufs-i-Wajoob or Sabab shewing the fact of an incipient and inchoate obligation; but on due date there is Wajoob-i-Ada or obligation for the actual performance of an act. The debt before and up to due date constitutes a mere Sabab or a material and foreshadowing cause; and on due date there is a direct command to pay occasioned by the presence of the Illut or compulsory cause, the obligation to pay having become fructified and potentialised by the perfection of time; and that cause is susceptible of no further postponement or delay in regard to the production of its effect.

No. 6.—Appendix B to the Review, referred to in this Review para. 23, and sub-para. D and E containing passages in Arabic from 2 Azmery, p. 444; and Miratool Oosool, pages 66 and 68, and 1 Azmery, p. 291, and other works. (See Supplement to Review.)

Appendix No. 6A to the Review, being an extract from a paper in the Nineteenth Century of 1905 by the pen of Mr. Ameer Ali. (See The *Bengalee*, 28th October, 1905.)

THE ILLS OF THE MAHOMEDANS.

Finally, Mr. Amir Ali deals with the question of his own community, the Mahomedans. Their ruin, he says, began with the confiscation of the Inam Commission in the early part of the Nineteenth Century; but it has been completed by the recent pronouncements of British courts of justice upsetting one of their most cherished institutions, which is interwoven with their entire religious and social life, and on which rests the whole fabric of their prosperity as a people.

Under the law of inheritance prevailing among the Mahomedans, the property of a deceased person is liable to be divided among a numerous body of heirs. An unqualified application of this rule would mean the absolute pauperisation, within a short pace of time, of Mahomedan families, and prove utterly subversive of national and individual well-being. No permanent benefaction nor the continued existence of family influence or prestige, without which progress is out of question, would be possible. Accordingly, it was ordained by the Lawgiver of Islam that a Mahomedan may lawfully "tie-up" his property, and render it inalienable and nonheritable by devoting it to pious purposes, or, to use the language of Mahomedan lawyers, "by dedicating it to the service of God, so that it may be of benefit to mankind." This is the well-known rule of *wakf* universally recognised and acted upon throughout the Mahomedan world. The endower is entitled to designate any pious purpose or purposes to which it may be applied; and either to constitute himself the trustee or appoint any other person. Now, the Mussulman law declares in the most emphatic terms that charity to one's kith and kin is the highest act of merit, and a provision for one's family and descendants, to prevent their falling into indigence, the greatest act of charity. Accordingly, family benefactions or *wakfs*, providing for the maintenance and support of the donor's descendants, either as the sole beneficiaries or in conjunction with other pious objects, have existed for the last thirteen centuries, and all sects and schools are unanimous in upholding their validity. The institution is traced to the Prophet himself who created a benefaction for the support of his daughter and her descendants, and is, in

fact, placed in the same category as a dedication to a mosque. As perpetuity is essential to a lawful *wakf* when it is made in favour of descendants, it is often expressly provided that on their extinction the benefaction would be for the poor. But even when there is no such provision, the law presumes that the poor are the ultimate beneficiaries. When the dedication is initially for the maintenance of descendants, provision is invariably made for other pious purposes, such as the support of religious worship, performance of religious ceremonies, and the upkeep of schools and hospitals. From this it will be seen how utterly uncongenial, if not incomprehensible, the Mussalman law of *wakf* must be to an English lawyer. Perpetuity is the essence of a Mussulman dedication or *wakf;* prepetuities are abhorred by English law, and any settlement which savours of it is bad on that ground. Charity to kith and kin is the pivot round which revolves the religious and social life of the Mahomedan, and is one of the most pious of purposes to which he may consecrate his worldly goods. To an ordinary English mind remembering the phrase "charity begins at home" it is a matter of ridicule, and so an English lawyer says it has the appearance of fraud.

In India, numbers of Mahomedan families owed to the institution of *wakf* their existence, wealth and influence which preserved the properties from disintegration and division, and protected them from the hands of money-lenders. They maintained places of worship, supported schools and dispensaries, and afforded material help to Government in times of stress and difficulty.

The validity of family benefactions was accepted by the British courts of justice until recent times, and eminent judges like Sir Edward Ryan and others gave it emphatic recognition. But the knowledge or appreciation of Mahomedan law became rarer and rarer as we approached the eighties, and the fetish of the English rule against perpetuities loomed bigger and bigger in the judicial mind. The money-lender, who sits at the gate of every prosperous family, watched his opportunity; whilst the vakil saw a rich harvest before him ready for his legal scythe. The younger members of the Mahomedan family pledged their right of maintenance to the *mahajan*, who, on failure of repayment at the proper time, brought the inevitable action to set aside the dedication and have the share of the debtor ascertained and sold for his debt.

The High Court considered that, not only was he entitled to his money, but that the benefaction was liable to be set aside as contravening the English rule against perpetuities! The matter came up on appeal, and the Privy Council, differing from the lawyers of Islam, who have upheld the validity of family benefactions for many centuries, considered the Mussalman Lawgiver could hardly have intended that a valid dedication could be made for the endower's descendants under the name *wakf*—when no

charity was in reality contemplated. It is clear that the whole difference arises from the use of the word "charity" in the English and not in the Mahomedan sense. The effect of this ruling, which has naturally caused great alarm, not to say resentment throughout Mahomedan India, has been most disastrous. It has already swept away many Mahomedan families, whilst the few still intact are in a state of jeopardy. But what is most deplorable is that in pronouncing against family endowments the courts of justice have also invalidated the provisions for auxiliary pious purposes.

The only way out of this *impasse*—the only way in fact by which the further impoverishment and decadence of the Mussalman people can be stopped—is for the Legislature, in their interests as well as in the interest of the State, to validate by special enactment this particular branch of the Islamic law, with any provision it may consider expedient to safeguard against fraud. And the statesman who succeeds in placing such a measure on the statute book will be regarded by a nation as the chief instrument of its salvation.

No. 6*B*.—Extra Appendix referred to in para. 26c., page 147*n*, of Part II of the Review.

WHAT IS A MAHAL ?

1. Hal and Mahal are correlative ideas. The latter is objective and the former is subjective. An act must have some object towards which its energy is directed: the act is Hal and the object towards which its energy is directed is Mahal. Hal and Mahal are expressions involving generality in a higher degree than the idea involved in an act and the object of that act: but my purpose will be served by taking Hal to mean an *act* and by taking *Mahal* to mean the *object* towards which the action or energy of the act is directed. For instance sale is an act and its Mahal is the subject-matter of the sale: Nikah is an act and its Mahal is the particular woman concerned: to make Wakf is an act and its Mahal is the particular property which is sought to be converted into Wakf, and so forth. (See Mira, p. 117, for the discussion regarding the use of Hal and Mahal for each other by way of Majaz or metaphor. See Mira, p. 75. Hoor or a free man is no Mahal for sale, see Mira, p. 192. The Illut must move towards the Mahal.)

2. The next point is the difference between a Hissee Fail and a Shuryee Fail, the former being an act perceptible to the senses, which act gets constituted or formed and completed without any principle of the Shera being involved simply by the combination, and presence of the natural elements of the act. (See para. 23, page 135*n*, of the Review).

3. The examples of Hissee acts are respectively as follows:—

A—Zooloom or oppression and tyranny.
B—Abus or employing and occupying one's time in vain.
C—Sufha, folly.
D—Koofr or ungratefulness.
E—Zina or whoredom.
F—Luwatut or sodomy.
G—Intercourse (with a woman who is in her menses).

4. The examples of Shuryee acts are as follows:—

H—Saying prayers (without purification or Wazoo).
I—Keeping fast and saying prayers (whilst in menses).
J—Sale (in which the subject-matter is a free human being).
K—Do. (is khumur or wine).
L—Do. (is mazameen or what is in the loins of a male camel by way of energy to produce the young of a camel).
M—Do. (is malakeeh or what is in the womb of a female camel by way of capacity to give birth to the young of a camel).
N—Nikah (without witnesses).
O—Sale (without specification of the consideration).
P—Riba (or usury that is inadequacy of consideration).
Q—Sale (for the consideration of wine.
R—Sale (with condition or Shurt to benefit either of the contracting parties beyond and outside the contract and agreement.
S—Fast (on the prohibited day that is the Eed and Bakreed).
T—Prayers (in prohibited times).
U—Sale (at the time when the crier calls for prayers).
V—Prayers (whilst on land obtained by Ghusub or usurpation).
W—Sale where there is no response to the formula in the same Mujlis or Ittihadool Mujlis. (See Ruddool Moobtas, Vol. 4, p. 5.)
W(1)—Sale by Moonabuzat and Moolamusut (as to which see 1 Az. 331; and 3 Oomdutool Ryaya on Shuruh Vikaya, p. 45 Annotation; and Baillie's Sale Law, p. 186).

The acts enumerated above, outside the bracket, are Shuryee acts.

5. As submitted above in para. 15A, pages 111*n* and 130*n*, sub-paras. 3° (dealing with the Ahul or fit person); 4° (dealing with the appropriate formulæ or signs of Illut); 5° (dealing with the fit Mahal); and 7° (dealing with the conjoint effect of 3°, 4° and 5°), there are certain rules which must be complied with and fulfilled before a Shuryee or legal act could be accomplished or achieved and effected, that is, brought into existence

and being, from a state of non-existence. It is the existence of these rules so laid down by the Shera that makes the acts to which they relate Sherayee or legal acts and distinguishes them from mere Hissee or sensuous or natural acts; the latter come into being by acts done naturally without any condition being laid down by the Shera for their existence. The acts specified in para. 3 above from (*A*) *to* (*G*) are naturally done, no condition of the Shera being necessary to bring them into existence and give them a status or position: whereas the acts specified in para. 4 aforesaid, under headings *H to W*, are of a nature that certain rules of the Shera are necessary for the creation of those acts and for their accomplishment, and for them to get converted from a state of non-existence to the state of existence and to get recognised as acts. (See also Mahomed Yusoof's Tagore Lectures, Vol. 3, p. 2 of the Appendix.)

6. Mira at p. 73, etc., lays down certain rules which are necessary to appreciate the difference between void or Batil, and defective or Fasid and valid or Saheeh; a summary of these rules is here given.

7. Nahee or negative command is a word expressive of a command to abstain from an act: the Nahee implies that the act to be abstained from and avoided has koobuh or badness in it in the sense that the act lays the doer open to present blame in this world and to future punishment in the world to come. Koobuh or badness is of two kinds: (I) one laiaynehee or badness on account of the essence of the act; and the other (II) laighyrehee or badness on account of something different from the act but relating to or involved in the act in question

8. Koobuh Laiaynehee or badness on account of the essence of the act (*i.e.*, No. 1, of para. 7) may arise in two ways, that is to say, it may be in reference to two kinds of act, *viz.*, Hissee and Shuryee.

9. Koobuh-lai-ghyrhee (*i.e.*, No. II of para. 7) may also arise in two ways, that is to say, it may be in reference to two kinds of act, *viz.*, Hissee and Shuryee.

10. Class II or Koobuh-lai-ghyrhee, as relating to each of the two kinds of act referred to above, might arise in two ways, that is to say (II*a*) when the Ghyer or the thing different from the act (which different thing has really the koobuh or badness in it so as to reflect it on the act by its connection with the act) is a Wusf or quality which cannot be separated from the acts, or (II*b*) when the Ghyr or the thing different from the act (which different thing has really the koobuh or badness in it so as to reflect it on the act by its connection with the act) is a Moojawir or adjunct or concomitant circumstance which sometimes accompanies the act and sometimes not, and which can be separated from the act.

11. Again referring to the tables in paras. 3 and 4, it will be clear that the items in para. 3 under headings

A, *B*, *C*, *D* } come under the class of Koobuh-lai-ain-hee, because common-sense and reason (without any artificial rules) are sufficient to shew that the items shewn under these headings are kabeeh or bad according to their very essence, and the badness does nor arise on account of some Wusf or quality or on account of some adjunct or Moojawir.

Item *E* and item *F* } of para 3 aforesaid are not kabeeh or bad on account of their essence but are bad on account of a quality; that quality is the circumstance which can never be separated from the act, *viz.*, that the act involves the loss of semen which was intended to produce species: and this production of species is one of the items of Hikmut which God has in view, as shewn by me in C. L. J. Vol I, p. 127 to para H, sub-para. *b*. I suppose rules of morality have not much to do with the prohibition, but the prohibition arises on account of the circumstance that the act has a tendency to frustrate the policy or Hikmut which God has in view, although this latter principle points to a rule of morality in one sense.

Item *G* of para. 3. is an instance of a Moojawir or adjunct in which the badness really lies, but this badness is not a quality of the act; on the other hand it can be separated from the act: the act of sensual intercourse is a Hissee act which may take place without the menses being on; therefore intercourse whilst the woman is in her course is not bad on account of its essence or on account of some inseparable quality but on account of an adjunct or concomitant circumstance which may accompany the act or not.

12. Referring to the table in para. 4, the items under the various headings are also divided into 3 classes: (I) those that are kubuh lai-ain-hee or bad on account of their essence; (II) kubuh lai-wusf-hee or those that are bad on account of some quality in the act which quality cannot be separated from the act; and (III) those that are kubuh or bad on account of a Moojawir or adjunct which can be separated from the act.

It must be noted that in Shuryee or legal acts which alone comprise the items in this table, *i.e.*, the table in para. 4, the koobuh-lai-ain-hee or badness for the essence of the act (leaving aside for the present the other two classes) arises from four causes, all of which point to one common result, *viz.*, the Shuryee or legal effect fails to get created and to come into existence although the causes of the failure are four in number.

I°. When there is absence of fitness or Ahleut in the doer of the act.

Item *H* of para. 4 is an illustration of Koobuh-lai-ain-hee in a Shuryee act where the Koobuh or badness arises from absence of Ahleut or fitness in the doer of the act; because without purification or Wazoo no person is Ahal or fit to say prayers.

Item *I* of para. 4 is of the same nature, because no woman in her menses is an Ahal or a fit person to keep fast or to say her prayers.

Under this class, *viz.*, absence of fitness or Ahleut, comes the case where the person making the Wakf ceases to remain fit for Sawab by becoming a heretic. (See para. 6 of the Review, p.).

II°. When there is a absence of fitness in the Mahal or subject-matter of the act.

Item *J* of para. 4 is an illustration of Koobuh-lai-ain-hee in a Shuryee act where the Koobuh or badness arises from the absence of a fit Mahal or proper subject-matter towards which the act is directed.

Item *K* of para. 4 is an illustration of the same principle as in item *J*.

Item *L* of para. 4 is also the same.

Item *M* of para. 4 is also the same.

III°. When there is absence of compliance with a condition.

Item *N* of para. 4 is an illustration of this principle because it is a condition for the validity of a Nikah that the same should be duly witnessed.

IV°. When there is absence of Illut owing to absence of pronunciation of the formula.

Item *W* of para. 4 is an illustration of this principle; because the sale is there sought to be effected practically without the pronouncement of the formula.

13. Class II (see para. 12) of the items comprised in the headings of para . 4 consists of items in which the Koobuh or badness arises from some quality which is inseparable from the act. This class consists of the following items included in para. 4, *viz.* :—

O—Sale without specification of consideration (as to this see para. 4 of the Review at page 160*n*).

P—Riba or usury, *i.e.*, inadequacy of consideration (as to this see para. 4 of the Review at page 160*n*).

Q—Sale for the consideration of wine (as to this also see page 160*n*, para. 4).

R—That is to sell with a condition likely to benefit either party and being outside the contract. This item partakes of the nature of Riba

or usury, inasmuch as it secures to one of the parties some additional advantage which produces inequality in the exchange which legally must involve equality in value of the property sold and the consideration paid for.

S—Fast on the prohibited days also involves Koobuh or badness in a Wasf or quality, that Wasf or quality being that the particular day is a day of feast as on behalf of God, and to fast on such a day is to reject (Airaz) the feast, and this quality is inseparable from the act of fasting.

T—Prayers in prohibited times also involve badness in a quality which is inseparable from the act of praying.

*W*1 also comes under this class.

14. Class III (see para. 12) of the headings in para. 4 consists of the following items or heads which involve badness of Moojawir or adjunct, and this badness is capable of being separated from the act; and thus this class differs from the preceding class in that the preceding class involves Koobuh or badness of a quality which is inseparable from the act.

U—A sale is prohibited when the crier sounds his call for prayer; at such a call it is the duty of a Moslem to leave business and run or proceed and hasten towards the mosque. To transact a sale at such a time therefore involves badness; but this badness is on account of an adjunct or Moojawir which could be separated from the act, because the badness could be cured and purged by running towards the mosque whilst at the same time the parties are negotiating the sale.

V—Prayers on usurped land involves badness for a Moojawir or adjunct, and this latter could be separated from the act of prayer and put an end to.

15. Then the rules to determine which kind of Koobuh or badness affects and relates to or attaches to a particular act are as follows: First, find out whether the act is Hissee or Shuryee. If the act is Hissee, then if the prohibition is unaccompanied by any circumstance shewing whether the prohibition is on account of essence or quality or adjunct, the prohibition must be presumed and taken to refer to the essence of the act. The illustration of this rule is to be found in the items *A*, *B*, *C*, and *D* of the headings specified in para. 3.

16. If in the Hissee acts the prohibition is accompanied by explanatory circumstances or Kureena shewing that the prohibition is not on account of the essence of the act, then if the prohibition is such that it refers to a quality of the act, the Koobuh or badness will be taken to belong to the Koobuh or badness of the essence as in the first class. The instances of this class are

to be found in items *E* and *F* of the headings under para. 3. In other words, in the case of a Hissee act, the Koobuh or badness in the quality or Wasf is reckoned as being equivalent to Koobuh or badness of essence. But if the badness or Koobuh arises from a Moojawir or an adjunct then the Koobuh or badness is not reckoned as attaching to or fastening on the essence of the act but on the other hand it is deemed to attach to and fasten upon something else, that is, something different from the human act under consideration. The illustration of Koobuh or badness on account of an adjunct is contained in item *G* of para. 3. The result therefore is that in a Hissee act the badness or Koobuh on account of an inseparable quality is tantamount to badness of the essence, and the act involving Koobuh or badness in its essence or involving Koobuh or badness in its quality is absolutely void or Batil. But if the act involves badness or Koobuh on account of a Moojawir or adjunct, then it is not absolutely void but it is abominable or Makrooh.

17. Now as regards a Shuryee or legal act, the rules for determining whether it is Suheeh or valid, Batil or void, Fasid or invalid, are as follows :—

If there are indications shewing the nature of the causes for the badness or Koobuh in a Sharyee act, then the quality of that badness or Koobuh, that is, its nature whether it is on account of essence or quality or adjunct, will depend upon such indications or Kureena. If it appears that the Koobuh or badness arises from the essence or Ayn, then the act is absolutely void or Batil, as for instance items *J*, *K*, *L*, *M*, and *W* of the instances mentioned in para. 4 aforesaid. If the indications shew that the badness arises from a quality or Wasf then the result is that the act is Fasid or invalid, as for instance the items *O*, *P*, *Q*, *R*, *S* and *T* of the instances mentioned in para. 4 aforesaid. If the indications shew that the badness or Koobuh arises from an adjunct then the result is that the act involves Karahut or abomination only. The illustrations of this rule are contained in items *U* and *V* of para. 4. If there is no indication to shew the nature and quality of Koobuh or badness in a Shuryee or legal act, then in the absence of such an indication the prohibition with reference to such an act is presumed to refer to badness or Koobuh on account of Wasf or quality.

18 It will thus be seen that in a legal or Shuryee act the prohibition or nahee relates to a defect, that is, badness or Koobuh in Wasf or quality. I use the expression a legal act, because (and this is a point which must be carefully kept in view) before a legal act is formed, that is to say, before you predicate, in reference to an act, that it is a legal or Shuryee act, there must be compliance with four matters already referred to above in para. 15, page 128*n*, and elsewhere, and those matters resolve themselves into the following items, *viz.*, the Ahal (I°) ; the fitness of Mahal (II°) ; the compliance with condition (III°) ; the existence of Illut in the shape of

the pronouncement of the formula and the impact of the Illut with the Mahal (IV°). Unless these four matters are found in combination the legal or Shuryee act does not come into existence in its highest or most perfect form; the existence of the legal or Shuryee act is caused by the will of God in favour of that act; and when such an act has once come into existence, it cannot cease to exist if the circumstances which brought them into existence continue to exist. Therefore, an apparently and seemingly legal or Shuryee act involves badness in its essence or Koobah lai-ainhee only when the Koobuh or badness is of a nature so that the act is prevented from attaining the position of a real legal or Shuryee act; and as I have already shewn, the cause of such prevention being the requisites already alluded to, it follows that a legal or Shuryee act is Batil or void only when it does not attain the position of a properly-constituted legal or Shuryee act on account of failure in any one of the four particulars pointed out; and that after the legal or Shuryee act is legally or duly constituted no defect or badness and Koobuh can affect the essence of that legal or Shuryee act but it must affect its quality or Wasf. A compliance of those four matters shew that there is goodness or Hoosn in the particular act, which goodness or Hoosn, being of the essence of the act, can co-exist with badness of Wusf or quality in that act, although it cannot co-exist with badness of essence of the act. In other words, in order to make a legal or Shuryee act void or Batil, there must be initial defect so as to prevent that act from being duly constituted; on account of the absence of any one of the four matters mentioned above, there is no legal constitution of the act in its perfected or completed state; so that although the form of an act is gone through still the Shara does not recognise it, and after the vain attempt to constitute a legal act, the attempt resembles the void or Batil Hissee act called Abus (see item *B* of para. 3, page 160*n*); in such a case the individual who purported or pretended to engage himself with an act and to accomplish a legal act, used his energy and employed his time in a vain attempt to accomplish something which he failed to accomplish; he therefore wasted his time which should always be usefully employed; and for this waste of time, which Providence in its bounty bestowed on him, he incurs sin, in addition to his acts being of no effect whatever.

19. It is necessary to pursue only one of the four elements essential for the constitution of a legal or Shuryee act, *viz.*, the element of Mahal, leaving aside for the present the other three elements, *viz*, the Ahal, the Illut and the conjunction or impact of the Illut with the Mahal after its emanation from the Ahal, and the compliance with necessary conditions. As shewn in para. 4, page 160*n*, the instances of absence of Mahal are items *Y*, *K*, *L*, and *M*. The Mira at p. 75, last line, says in the case of the sale of a free human being, there is absence of Mahal because the Shera has rendered the

Mahal or subject-matter of sale to be Mal-i-moot-kuwim or property having value at the time of the sale for the purpose of deriving benefit, and a free human being is not Mal or property. Without at present defining precisely what is Mal or property and what is Mal-i-moot-kuwim or property having value, I may say that all instances of absence of Mahal are instances of absence of valuable Mal or property; and that in the Wakf cases which have been set aside by the P.C., there was not a single case in which the Wakf property was not Mal or which involved absence of Mahal; it is only when Mahal is absent, other conditions being fulfilled, that the Wakf is void or Batil: intention to create a perpetuity being a wholly irrelevant matter, not being included in any one of the four essentials necessary to constitute a legal or Shuryee act.

20. It may be useful and interesting to enquire how prohibition intended to apply to a Mahal is expressed in the authorities which lay down the prohibition. The matter is discussed in Mira, p. 129 and 1 Az. 466. Sometimes the prohibition relates to the act or 'fail' and sometimes to the essence or Ayn of the thing prohibited. God says, "Prohibited or unlawful unto you are your mothers." "Prohibited unto you is Myta or carrion." "Lawful unto you is Baheem-a-Anam or cattle and goat." "Prohibited unto you is Khumur or wine." "Prohibited unto you is Khanzeer or pork." In the instances where the prohibition relates to the Ayn or essence of the thing, some lawyers are of opinion that the expression is a metaphorical (or Mujaz) use of Mahal (or subject-matter) for Hal (or act); whilst others are of opinion that there is an ellipsis, because lawfulness and unlawfulness relate to human acts and not to the essence of the things to which acts appertain; but the correct view is that there is here neither a metaphorical use of word nor an ellipsis; on the other hand, the words are used in their real original (or Hakeeky) meaning; because Huram or a thing prohibited consists of two classes: one class is where the prohibition relates to the Ayn or essence itself of the Mahal, such for instance as the prohibition which relates to the eating of carrion (Myta) and to the drinking of Khumar or wine; and this is called Haram-lai-Aynhee or unlawful in the essence; the other class is where the unlawfulness is not in the Mahal or subject-matter but in something else; that is where the Mahal is not Huram but something else is Huram; for instance the prohibition (or Hoormut) to eat of another man's property: here the essence of the thing is not Huram or unlawful but the prohibition arises from the circumstance that the property belongs to another, and his right prevents the property from being eaten by another; but if the eater has the permission of the owner then the eating of the property is not prohibited: so also the eating of the property is not prohibited to the real owner; thus there is a difference between the case which relates to the essence of a thing and where it relates to an act to be done

with reference to the thing; in the former case the Mahal is excluded from fitness for, and suceptibility to the act; and by attributing and referring the prohibition to the Mahal itself, the meaning is that the Mahal is (Ghyr Suheeh, or) unfit and unsusceptible for a (Shuryee fail or) legal act; so that the essence or Nufs of it is Huram. Then the Azmeery says the result is (Al-Hasilo) that when (Tahreem or) prohibition, and (Tahleel or) lawfulness are referred to an act, there is Hukeekut or orginal and real (as distinguished from metaphorical) use of the expression to mean Huram-lai-Aynhee (or prohibition for the essence) and Huram-lai-Ghyrhee (or prohibition for something else); in other words, where the prohibition and unlawfulness are referred to the Ayn or essence of a thing, there the use of the expression is in its original (or Hakeekut) sense in case of Haram-lai-Aynhee according to the correct view, although it is a metaphorical use according to some; and the use of the expression is by way of Majaz (or metaphor) in the case of Haram-lai-Ghyrhee. See also Mira, p. 281 and 2 Az. p. 391, where it is laid down that prohibition of Khumar (wine) and Khunzeer (pork) and Myta (carrion) relates to the Ayn or essence and that the prohibition to eat the property of another is a prohibition which relates not to the essence but to something else; where the prohibition relates to the essence, the Mahal is not fit or susceptible of an act being done in reference to it; as for instance (Subbool mai or) prohibition against pouring out of water when there is no water in the vessel; in the second case the Mahal is fit for an act being done in reference to it to a certain extent, as the prohibition to drink water when there is water in the vessel.

21. There is an important point with reference to what is good Mahal for Wakf. What is the nature of Mal-i-moot-kuwim or property having value which would satisfy the requirements of a fit Mahal in a Wakf case. This question does not directly arise in the Review in which the question relates to the Wakf cases dealt with by P.C. in which the Mahal was strictly fit and proper. The extreme limit of property to be validly included in a Wakf might be indicated in a general way as follows:—Whatever is not a fit and appropriate Mahal for a Shuryee or legal act cannot possibly be included in a Wakf; this excludes Khumur (wine), Khanzeer (pork), and Myta (carrion), which are Nujis-lai-Ainhee or impure in their essence. On the other hand it is difficult to exclude from the subject-matter of Wakf what is a fit and proper Mahal for a Shuryee or legal act. What this is or might be, must form an independent subject for discussion. As to Mal-i-moot-kuwim, see Mira, p. 62 and 1 Az. p. 272: Mira, p. 78 and 79; p. 281, 2 Az. 391: Mira, p. 289 (as to Ijara) and Kushif-i-Buzduwee, Vol. 1, p. 268 See also Ruddool Moohtar, Vol. 4, p. 3.

CORRIGENDA.

At	*For*	*Read*
Page 120*n*, line 9 from the bottom	"all of the jndges." ...	"all the judges"
Page 122*n*, line 5 from top	"the latter is not a wakf'	"the latter is not. A Wakf"
Page 126*n*, line 10 from bottom	"amounts to and now"...	"amounts to and how."
Page 130*n*, line 13 from top	"(see Mira, p. 192)" ...	"Mira, p. 192"
Page 130*n*, line 25 from top	"p. 111*n*"	"p. 112*n*"
Page 135*n*, line 5 from bottom	"At p. 312 of the Miratool Oosool, 2 Azmery p. 444, as commented on by"	"At p. 312 of the Miratool Oosool as commented on by 2 Azmery, p. 444."
Page 141*n*, line 8 from bottom	"(adam-i-aslec)" ...	"(adam-i-aslee)"
Page 144*n*, line 6 from the bottom	"Kashf-v-Bazdavee" ...	"Kashf-i-Bazdavee"
Page 145*n*, line 2 from top	"Opposite" ...	"Apposite"
Page 145*n*, line 13 from bottom	"Sub-Law" ...	"Sale Law"
Page 146*n*, line 11 from bottom	"Any of the" ...	"Any the"

No. 7.—Appendage to the Review, being a copy of the Memorial of the Mahomedan Subjects of Her Gracious Majesty the Queen-Empress of India, regarding Wakfs, submitted to His Excellency the Viceroy on——.

TABLE OF CONTENTS OF THE MEMORIAL.

No. 8.—THE MEMORIAL.

TO

HIS EXCELLENCY

The Right Honorable

GEORGE NATHANIEL BARON CURZON OF KEDDLESTON, G. M. S. I., G. M. I. E.,

In the County of Derby in the Peerage of Ireland,

The Viceroy and Governor-General of India

IN COUNCIL.

THE HUMBLE MEMORIAL OF THE MAHOMEDAN SUBJECTS OF HER GRACIOUS MAJESTY THE QUEEN-EMPRESS OF INDIA

RESPECTFULLY SHEWETH,

1. THAT Your Memorialists, as loyal and devoted subjects of Her Gracious Majesty the Queen-Empress of India, under whose beneficent rule all classes and communities inhabiting this vast country enjoy perfect liberty of conscience, beg earnestly, but with the utmost deference, to invite the attention of Your Excellency in Council to the widespread feeling of alarm and consternation caused among the Mahomedan inhabitants of India at certain enunciations of a Full Bench of the Calcutta High Court in a case decided on the 1st of August, 1892, and reported in the Indian Law Reports, 20 Calcutta Series, page 116, the tendency of which seems to Your Memorialists to be to destroy one of their most cherished religious institutions, *viz.*, Wakfs, in which the members of the endower's family are the primary recipients of the benefaction; and to render difficult, if not impossible, the practice of their religion, and the enjoyment of their own laws guaranteed to them by the British Government. This feeling of alarm and consternation has been intensified by the construction of the Mahomedan Law of Wakfs in the recent case of *Abul Fata Mahomed Ishak* vs. *Russomoy Dhur Chowdhry*, decided by their Lordships in the Privy Council and reported in L.R. 22, I. A., 76—a

construction which, it is universally believed, is subversive of the Mahomedan Law of Wakfs.

2. Sir Comer Petheram, the Chief Justice, at page 231 of the said Full Bench decision reported as aforesaid in I.L.R. 20 Cal. Series, says as follows:—

"A perusal of the Mahomedan books which I have mentioned, has created in my mind the impression that at the time when they were written, such dispositions were treated as valid, and I think that at the present time, the weight of authority, as far as the decisions of the courts established by the English Government are concerned, is in favour of their validity; and as it has been argued on behalf of the plaintiffs that their view is supported by the current of authority, I think it well to see what the decisions on this question have been though in the result I do not propose to express my opinion upon it. * * * * * * *

"There are many expressions to be found in the various cases on this subject which indicate that, of late years at all events, the opinion of many of the judges has been that only such dispositions of property as would come within the meaning of charitable dispositions in the ordinary English meaning of the words, would constitute valid Wakf; but I believe the four cases I have cited are the only ones in the books in which the question is decided whether a reservation of the income of the consecrated estate for the benefit of a family so long as it existed would render the grant for a charitable purpose inoperative and illusory; and inasmuch as in three out of these four cases it was held that the dedication was valid, notwithstanding the reservation, it seems to me that at the present time the weight of authority is in favour of that view."

3. The view taken by their Lordships of the Privy Council is to be found in the following quotation from their judgment. At page 85 of the L.R. 22 I.A., their Lordships observe as follows:—

"It seems that in the High Court the learned Advocate-General contended for the plaintiffs that a gift to the donor's descendants without any mention of the poor might be supported as a Wakf; and even that the Mahomedan Law intends that perpetual family settlements may be made in the name of religious trusts.
C (C) In the case of *Ahsanoollah Chowdhry* vs. *Amar Chand Kundu* (Law Rep. 17 I. A., page 37) this Board said, 'They have not been referred to nor can they find any authority shewing that, according to Mahomedan Law, a gift is good as a wakf unless there is a substantial dedication of the property to charitable uses at some
B period of time or other.' (B) The Board proceeds to affirm the decision of the High Court of Calcutta, who held that a small part of the property had been well devoted to charity; but that as to the bulk of it, the settlement was, notwithstanding some expressions importing a wakf, in substance nothing but a family settlement in perpetuity, and as such contrary to Mahomedan Law. The principle of this decision has been quoted and approved in a subsequent case; *Abdul Ghafoor* vs. *Nisam-ud-din* (Law Rep. 19 I. App. 170). This is a sufficient answer to the arguments used in the High Court."

"Their Lordships, however, cannot now say that they have not been referred to any authority for the contrary opinion; for Mr. Branson has cited them two cases in which there are very elaborate judgments delivered in the Calcutta High

Court by the learned judge Mr. Ameer Ali. Those judgments are in accordance with the opinion expressed by him in his Tagore Lectures; and if their Lordships have rightly apprehended them, they do go the whole length of the
D Advocate-General s arguments. (D) One is in the case of *Meer Mohamed Israil Khan* vs. *Shashti Churn Ghose* (Ind. L.R. 19 Cal., page 412) where there were some immediate gifts to the poor, and the gift was upheld, and no further appeal was presented. The other case is that of *Bikani Meah* vs. *Shuk Lal Poddar* (I.L.R. 20 Cal., page 116) where there was no gift to the poor till after the failure of the settlor's family. It was held by a Full Bench of five judges who decided that the deed was invalid, Ameer Ali, J. dissenting."

F (F) "The opinion of that learned Mahomedan lawyer is founded, as their Lordships understand it, upon texts of an abstract character, and upon precedents very imperfectly stated. For instance, he quotes a precept of the prophet Mahomed himself to the effect that 'a pious offering to one's family, to provide
E against their getting into want, is more pious than giving alms to beggars. (E), The most excellent *Sudka* is that which a man bestows upon his family. And by way of precedent he refers to the gift of a house in Wakf or *Sudka* of which the revenues were to be received by the descendants of the donor Arkan. His other authorities are of the same kind."

"As regards precedents their Lordships ought to know a great deal more in detail about them before judging whether they would be applicable at all. They hear of the bare gift and its maintenance, but nothing about the circumstances of the property, except that in the case cited, the house seems to have been regarded with special reverence—or of the family, or of the donor."

"As regards precepts which are held up as the fundamental principles of Mohamedan Law, their Lordships are *not* forgetting how far law and religion are
A mixed up together in the Mohamedan Communities; (A) but they asked during the argument how it comes about that by the general law of *Islam*, at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions, that is, of inalienable life-interests, are forbidden, and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as a Wakf, in the name of God, or for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any. It is true that the donor's absolute interest in the property is curtailed and becomes a life-interest; that is to say, the *Wakfnamah* makes him take as Mutwali or Manager. But he is in that position for life: he may spend the income at his will and no one is to call him to account. That amount of change in the position of the ownership is exactly in accordance with a design to create a perpetuity in the family, and indeed is necessary for the immediate accomplishment of such a design."

"Page 88.—In favor of the view now urged for the appellants there is the judicial opinion of Ameer Ali, J. in Bikani Meah's case (I.L.R. 20 Cal. series page 116) dissenting from the rest of the Court; a dictum of Sir Raymond West in the Bombay High Court in the case of *Fatima Bibi* vs. *The Advocate-General of Bombay* (I.L.R. 6 Bombay, page 53) and a decision of Farran, J. in the same Court in the case of *Amrit Lall Kali Das* vs. *Sheikh Hossein* (I.L.R. 11 Bombay, page 492). The weight of Ameer Ali, J.'s opinion on this subordinate point is

somewhat lessened by his support of the gift under consideration on the very broad grounds which their Lordships have considered to be untenable. The dictum of Sir R. West is mentioned in Ahsanullah Chowdhry's case (L.R. 17 Indian App., 28). Farran, J., had before him a case very closely resembling the
H present one: (H) he describes the settlements as 'a perpetuity of the worst and most pernicious kind, and would be invalid on that ground unless it can be sup-
G ported as a *wakfnama*'; (G) and he thought that the authority of the Hedaya is against it, but he adopted the principle stated by Sir R. West which he treated as a decision, and he supported the gift on the strength of the ultimate trust for the poor. Their Lordships cannot assent to these conclusions. They make words of more regard than things, and form more than substance' * * *"

4. After laying down the office of Chief Justice of Calcutta, Sir Comer Petheram still pursued his research on the Wakf question, and the result was a contribution to the "Law Quarterly Review," which is reproduced in full in Appendix I attached to this Memorial. (See page 18). His Lordship, referring to the Full Bench case, says, that an examination of the Mahomedan Law authorities raised doubt in his mind regarding the correctness of the decision of the Privy Council in a previous case (I.L.R., 17 Cal., page 498; *Mahomed Ahsanullah Chowdhry* vs. *Amar Chand Kundu*) in which their Lordships had laid down that there must be a substantial and not an illusory gift of the property to charitable uses: and his Lordship further says that in the judgment which he then wrote, he endeavoured with all possible respect to indicate the doubt which existed in his mind. His Lordship then refers to the later decision of the Privy Council reported as in paragraph 1 of this Memorial, and says, "the effect of this decision is that any Wakf under which the founder has reserved the income to himself for life and after his death to his descendants cannot now be sustained in British India, and all rights and interests created and enjoyed under such Wakfs are destroyed." His Lordship then shows how he informed himself of the law and practice which obtained in Mahomedan countries such as Turkey and Egypt (and Persia might also be added to the Mahomedan countries), and the result of his enquiry was that in such countries both law and practice were in favour of the validity and legality of the Wakfs set aside by the Full Bench and the Privy Council. His Lordship refers to French authorities on Mahomedan Law, which are in complete accord with the argument in favour of the maintenance of Wakfs addressed to the Full Bench and in complete accord with the view taken by Mr. Justice Ameer Ali.

5. The question also attracted the attention of Lord Stanley of Alderley, and a discussion took place in the House of Lords on the 29th June, 1896, the proceedings of the House of Lords being

reproduced in Appendix II (see page 20) to this Memorial. His Lordship threw doubt on the correctness of the law laid down by the Privy Council, and bore testimony in favor of the practice in the matter of Wakfs which obtained in Mussulman countries, such as Constantinople, Egypt, and other places. Lord Stanley also contributed an article in the same lines on the Wakfs question in the January No. of 1897, of the Imperial and Asiatic Quarterly Review, from which portions are reproduced in Appendix III (see page 23), having the same force as contended for by your Memorialists.

6. That Your Memorialists thus beg leave to mention that the law relating to such Wakfs has been in force, as contended for by your Memorialists, for the last fourteen centuries, and has been cherished and valued by Mussulmans in every country, where Islam is recognised and practised as an integral and essential part of their religious system It is based upon the direct ordinances of the Founder of the Mussulman religion, which are regarded by his followers as divine commandments supplementary to those contained in the Koran. The Prophet of Islam not only declared such Wakfs to be valid and lawful, but encouraged their creation by dedicating his own property, the little he had, in favour of his posterity. And, consequently, Wakfs constituting the endower's family as the primary recipients of the charity, with an implied or express reversion in favour of the poor or of some other unfailing subject, have existed at all times from the time of the Prophet up to the present day. Every law book deals with the subject; and there is absolutely no difference among the sects into which Islam is divided about the validity and lawfulness of such an institution. The *Fatáwai-Alamgiri*, the great Digest of Mahomedan Law, prepared under the command of the Emperor Aurangzebe, and which has always been recognised as the highest work of authority, expressly enunciates and emphatically lays down the lawfulness of such Wakfs, giving minute details as to the manner in which they should be created. These institutions have now become interwoven with the entire social and religious economy of the Mussulmans of India, and are inseparable from their inner life as a community; and many of their principal families, who have on occasions of emergency rendered to the State loyal and devoted assistance, are dependent for their existence on such Wakfs. The law on the subject of Wakfs constituting the endower's descendants as the primary recipients of the charity is so fully set out in Baillie's Digest, 2nd Ed., pages 579–586, and Ameer Ali's Mahomedan Law, Vol. I, pages 216–264 and pages 620–656, that Your Memorialists venture to crave a reference to the same, and to the judgment of the dissentient

judge in the case in question reported in Indian Law Reports 20, Calcutta series.

7. It is, therefore, with great regret joined to intense alarm, that Your Memorialists venture to invite Your Excellency's attention to the observations of the Calcutta High Court, the tendency of which, as Your Memorialists have already stated, is not only to abrogate this branch of their law, which is an important part of their religious system, but to render difficult the enjoyment of their religious rites and privileges —an eventuality which Your Memorialists, as loyal subjects of Her Majesty, cannot help regarding without the gravest apprehension.

8. Your Memorialists have no desire to make any comments upon the decision of the High Court or of their Lordships of the Privy Council, as it might neither be respectful, nor within their province to do so. But approaching Your Excellency in Council as the august representative of Her Gracious Majesty, they crave leave to call attention to certian erroneous notions which, in Your Memorialist's humble judgment, seem to underlie the decisions in the Bengal Presidency unfavourable to the law of Wakfs under consideration. The first notion is that a Wakf under the Mussulman law must be for purely charitable purposes; and for some peculiar reasons, which Your Memorialists submit are based on non-Mahomedan ideas, it is suggested, that the word *charity* must be understood in the limited sense, in which it is understood in the English law. Your Memorialists venture to think that this fallacious notion has given rise to all the errors in the judicial apprehension of the question of Wakfs. As Your Excellency is aware, the word "charity" has a much wider meaning under the Mahomedan Law and includes provisions made for one's own children or descendants. In order to show how meritorious and pious and how essentially religious a provision for one's own descendants, family and kindred, is in the Islamic system, Your Memorialists take the liberty to quote the following precepts of their Prophet and Lawgiver:—

The Apostle of God said, "When a Mussulman bestows on his family and kindred, for the intention of rewards, it becomes alms, although he has not given to the poor, but to his famliy and children." The Apostle of God said, "There is one Dinâr which you have bestowed in the road of God, and another in freeing a slave, and another in alms to the poor, and another given to your family and children; that is the greatest Dinâr in point of reward which you gave to your family." The Apostle of God said, "The most excellent Dinâr which a man bestows is that which he bestows upon his own family." Omm-i-Salma says, "I said to the Prophet, is there any good things for me of rewards, for my bestowing on the sons of Abu Salma? His sons are no otherwise than mine." The Prophet said, "Then give to them, and for you are the rewards of that you bestow upon them."

The Apostle of God said, "Giving alms to the poor has the reward of one alms, but that given to kindred has two rewards; one the reward of alms, the other the reward of relationship."

"The Prophet of God declared that a pious offering to one's family (to provide against their getting into want) is more pious than giving alms to beggars. The most excellent of *sudka* is that which a man bestows upon his family."

"To give to one's child or wife is a *sudka* according to the Prophet's precepts reported by Saad Ibn Abu Wakkâs."

"It is reported by Saad bin Jaffir who received the *hadis* from Lais, who again received it from Abdur-Rahman bin Khalid, bin Musâfar, who again received it from Shahâb, who received it from Ibn Musâib from Abu Hooraira, that the Prophet of God (may the blessings, &c.) declared that the best of pious offerings is a provision for one's self, so that he may not fall into need, and the (giving of) *sudka* should commence with those whose subsistence is obligatory on you."

"Said the Prophet of God, when a Moslem bestows on his family and kindred, with the object of earning the approval of the Almighty, it is *sudka*, although he has not given to the poor, but to his family and children." ....

"The most excellent of *sudka* is that which a man bestows upon his family."

"The greatest *sudka* is that which you give to your family."

"To give money to free a slave, to give alms to the poor, to give to your children and kindred are all *sudka*."

"The piety of all acts depends upon pious motive, with a desire to obtain the Almighty's reward. A man who provides the means of subsistence with a pious motive for his family is giving charity, and the Prophet of God has declared that it is a holy act."

"And the Prophet has declared, that a man giving subsistence to his family is giving *sudka*."

"Support of one's self and his children and family is the first duty and necessity."

And hence it is, that benefactions constituting one's descendants and kindred as the primary recipients of the charity are regarded with such extreme sanctity by the Mussulman law which is synonymous with the Mussulman religion.

9. That your Memorialists respectfully submit that the Mahomedan subjects of Her Majesty are entitled to claim that the word *charity* (*Sudka*) when occurring in their legal books should be construed according to the Mussulman sense, and not upon the basis of a hybrid mixture of English and Mahomedan legal conceptions or of something engrafted from English ideas on the Mahomedan use of the term.

10. As regards the decision of their Lordships in the Privy Council, Your Memorialists submit that their Lordships were guided by the following amongst other considerations :—

A. The analogy from the law of gifts under the Mahomedan Law, and how a Mahomedan, who could not under his law by means

of gifts create succession of inalienable life interests, should become enabled to do so merely by introducing the name of God.

B. The principle which it is supposed necessarily underlies the disposition called Wakf is that there must be a charitable use, and therefore the bulk of the property must be devoted to charitable uses.

C. That religious trusts must be co-extensive with charitable uses; and where there are no charitable uses, there cannot be religious trusts; and perpetual family settlements cannot be made in the name of religious trusts unless the latter take the form of a provision for the poor.

D. The provision for the poor must come into operation immediately.

E. Charity is charity according to its ordinary acceptance, *viz.*, its object must be the relief of the poor and not the support of the members of the family referred to in the texts and precedents cited.

F. The texts and precedents cited in favor of the validity of Wakf are of an abstract character, and are very imperfectly stated.

G. The authority of the *Hedaya* is against a Wakf in favor of the family.

H. The principle which underlies the whole of the decision of the Privy Council is that perpetuity is a thing which is to be avoided, and that the alleged Wakf, if valid, would sanction a perpetuity of the worst and most pernicious kind.

11. As regards argument *A* above cited, Your Memorialists respectfully submit that no analogy could be derived from the law of gift, which is a disposition in favor of a person without consideration, whereas Wakf is a disposition in favor of God for valid consideration. Under the Mahomedan Law dispositions are of two kinds, for consideration and without consideration: the latter are gifts: if the consideration is property, then the disposition is a sale: if the consideration is not property but religious merit in the sight of God in the world to come, then the disposition is *Sudka* which, when it is regarding immovable property is Wakf. Law and religion being blended together and mixed up according to Mahomedan ideas, *Suwab*, or religious merit, as consideration is, according to the Mahomedan Law, equally valuable if not more valuable than property, such as money when offered by way of consideration or exchange. The argument on this head was sumitted to the full Bench by Moulvie Mahomed Yusoof, Khan Bahadoor, who is the President of this Association, and the same pretty fully convinced the Judges who constituted the Full Bench that Wakf was based on the consideration of religious merit, and that a Wakf upon one's self and his descendants

was valid under the Mahomedan Law; but the learned Judges, who constituted the Full Bench, were unable to give effect to the argument in consequence of decided cases both in India and in the Privy Council, as the following quotations from the decision of the Hon'ble Judges constituting the Full Bench will show:—

(*a*) Mr. Justice Ghose, at page 180 of the Full Bench case, reported in I.L.R. 20 Cal. Series, page 116, says:—

"The Hedaya then gives (pages 335-337) the respective arguments of Aboo Huneefa and his two disciples. It is unnecessary to refer to them at length, but it may be useful to refer to one of the arguments of the two disciples. And it is this, 'There is a necessity for the appropriation being absolute, in order that the merit of it may result for ever to the appropriator, and this necessity is to be answered only by the appropriator relinquishing his right in what he appropriates and dedicating it solely to God, which dedication as being agreeable to Law in the same manner as that of a mosque, must, therefore, be made in the same mode.'"

(*b*) Again at page 201 Mr. Justice Ghose says:—

'It was strongly contended before us by the learned counsel for the appellant that a settlement of property by way of making provisions for one's support and the support of his descendants, how low soever, is itself a pious and charitable act according to the Mahomedan Law, and therefore the deed in question cannot be set aside upon the ground that there was no pious object in view, there being a contingent reversion to the poor; and certain passages from some of the Mahomedan Law treatises, especially, Book IX, Chap. iii, Sections 2 and 3 of Baillie's Digest were quoted before us in support of that position. These passages might possibly support this view, but that is not the view which has been accepted in our Courts, at any rate on this side of India, ever since the year 1798 down to the present time."

(*c*) Mr. Justice Trevelyan at page 207 says:—

"There can be no doubt that in questions of Mahomedan and Hindoo Law, the course of the decisions of the Privy Council and of this Court must first be considered. Attempts to disturb the decisions by reference to texts and the vernacular writings of ancient lawyers tend only to unsettle the law and to disturb the rights of persons who have acted according to the decisions of the Courts. The Mahomedan Lawyers of the day would be more likely to advise their clients and draw instruments in accordance with the view taken by the Court than with regard to ancient Futwas and Text Books.

* * * *

Again Mr. Justice Trevelyan says:—

(*d*) As I have said, I agree in thinking that the present *Wakfnamah* is invalid. I also agree in thinking that it is unnecessary to decide the question whether a gift to a man's descendants for ever is good, provided there be a subsequent gift to the poor or for other religious or charitable purposes. I use the word 'charitable' in the English sense, as that is the sense in which it is used in the decision in English Courts and in the translations into English. We have been invited to use the word 'charitable' in what is called the Mahomedan sense, *i.e.*, to use a word in another language which may mean another thing."

(*e*) Mr. Justice Prinsep at page 214 says:—

"* * Questions have been argued before this Full Bench for eight days, in the course of which there has been considerable discussion on complicated points of Mahomedan Law, and their application to cases such as that brought by the plaintiffs in these suits. * * *. I think, however, that it is unnecessary to enter into minute considerations of what may or may not be a valid Wakf under the Mahomedan Law, as obtained from the learned Doctors, because I find that that has been settled by our Courts by a long course of decisions commencing from 1798, and that it is only in recent times, as I shall presently show, that there has been any tendency to question the law so laid down."

Again Mr. Justice Prinsep says:—

(*f*) P. 215. "It may be mentioned here that it is only owing to the meaning of this term (the object of the Wakf being *religious and charitable*) that the difficulty in a great measuse has arisen." * * *

(*g*) P. 224. "Having regard then to the current of decisions which have settled the law at least on this side of India, I should not be prepared to adopt any new view of law unless it were laid down by some higher authority than one of our Indian Courts."

* * * *

"The view of the Mahomedan Law pressed on us at the hearing of these appeals is certainly new to our Courts, and I may say that I have no recollection, during a long experience, of its ever having been addressed to me. It certainly has never found any place in any of our reports, nor can we find that in any of our Reports were Wakfs founded on the principles which we are asked to adopt ever brought before our Courts."

(*h*) As regards the views entertained by the late Chief Justice Sir Comer Petheram, in addition to his Lordship's written judgments at page 230 of the Report, we have his article on the Wakf question in the "Law Quarterly Review" reproduced in Appendix I to this Memorial, page 18. His Lordship's views expressed in the Full Bench decision are quoted in paragraph 2 of this Memorial, and reference is made in paragraph 4 of this Memorial to the important passages of the article in the the "Law Quarterly Review."

(*i*) As regards the views of Mr. Justice Ameer Ali, they need not be specifically quoted here.

12. As regards the argument from "the current of decision" relied on by the Hon'ble Judges in the Full Bench decision, Your Memorialists submit that there was no uniform current against the validity of the Wakf; there are many decisions in favour of its validity; the current was often broken and was not sufficient to engulph and override the Mahomedan Law. In the Full Bench decision none of the Judges says that the arguments addressed in the defence of the Wakf were not in conformity with the Mahomedan Law: the most adverse remark

that was made by one of the learned Judges, was, as has been already referred to, that the argument was "new to our Courts, and, I may say, I have no recollection during a long experience of its ever having been addressed to me"; but none of the learned Judges goes the length of saying that the Mahomedan Law was different from what was represented; even Mr. Woodroffe, the then Offg. Advocate-General, who supported the other side of the question, could only say (see I. L. R. 20 Cal. Series, page 128): "The Court has to determine the law as found in the Statute Book and in previous decisions. The Mahomedan Law is not to be applied to the case, and disquisitions of a religious metaphysical or philosophical character are out of place." Again at page 131 he says: "The inference from cases is that the right to defeat creditors and to evade the law of inheritance and succession was not preserved to Mahomedans; that the learned lucubrations of Mahomedan casuists were never seriously regarded; and that these doctrines sloughed away leaving only genuine developments. 'What is religious is lawful, and what is lawful is religious' cannot be accepted as the principle. The power of life and death may be religious, but it is not lawful in the case of a husband, and the Mahomedan Law books are full of principles, which though religious could never be asserted in the Courts." In other words, the Officiating Advocate-General argued that though the Mahomedan Law was, as contended for by the Appellants, still it should not be given effect to. In this connection Your Memorialists take this opportunity to confirm what was stated by Sir Comer Petheram in his Article in the "Law Quarterly Review" that the Mahomedans, of India are grateful to their Lordships of the Privy Council for declaring that the Mahomedan Law should apply in the decision of Wakf and other dispositions of property made by Mahomedans, amongst whom law and religion are mixed up inseparably, though a contention had been raised that the result of a previous decision of the Privy Council was to apply the Engilsh Law of Settlements to cases of Wakfs. (See Appendix I, page 18.)

13. The learned Judges of the Full Bench therefore in effect said that, assuming that the Mahomedan Law was as contended for in that behalf, still in consequence of the "current," the law was settled, and Privy Council alone could change it.

14. Your Memorialists here beg to submit that in regard to questions of Mahomedan Law, the sources of that law are the Koran, the *Hadis* (or traditions) the *Ijma* (or concurrence of the learned Doctors), and the *kyas* or ratiocination. The Mahomedan Law as derived from its four sources is expounded in the original authorities, some of which have been rendered into English with more or less of imperfections.

There is no fifth source in the Mahomedan Law; and if the current of decision is contrary to the Mahomedan Law, then what the Courts, on the basis of such a current, declare to be binding on the conduct of a Mahomedan as a citizen and a member of a great State, is not binding on his conscience as professing the Mahomedan religion. Such a conflict in the conscience and conduct of a community is most deplorable, and should Your Memorialists submit, not be allowed to exist for a moment longer. The attention of Sir Comer Petheram was drawn to this conflict, and his Lordship has expressed himself forcibly on the subject in an article reported in the Law Quarterly Review. Your Memorialists reproduce the said article in Appendix V attached to this Memorial at page 26. Your Memorialists beg most humbly to draw Your Excellency's attention to the said article, and submit that Sir Comer Petheram has fully grasped the situation in regard to the conflict which has been unfortunately existing between the Judge-made Mahomedan Law and the real Mahomedan Law; between the Mahomedan Law as binding on the Mahomedans, only in so far that they have no choice in the matter and are forced to accept it without believing in the correctness of the same, and between the Mahomedan Law which is binding on the conscience of the Mahomedan subjects of Her Majesty the Queen-Empress of India. Your Memorialists also beg to submit that "the highest tribunal has been misled" (in the words of Sir Comer Petheram) in its appreciation of the Mahomedan Law of Wakf, and therefore change of the Law laid down by the Privy Council in the matter of Wakf and its restoration, by means of a legislative enactment, which is the object of this Memorial, would not in any way be now looked upon as an infringement of the rights of the Mahomedan subjects. Your Memorialists are therefore not troubled by misgivings such as those felt by Sir Comer Petheram in the said article regarding the effect of such a legislation on the feelings of Her Majesty's Mahomedan subjects.

15. Accordingly, when the case went to the Privy Council, their Lordships did not look to the current of decisions in support of their position but to the Mahomedan Law itself, and their Lordships did their best to ascertain the Mahomedan Law on the subject; but owing to the imperfect report of the arguments before the Full Bench as contained at pages 126 and 127 of the 20th Vol. of I.L.R., Calcutta Series, the points raised before the full Bench were lost before the Privy Council, who delivered a judgment, the key to which is the analogy from the law of gifts. Your Memorialists set forth in Appendix VIII, page 44, the notes of arguments of Moulvi Mahomed Yusoof, Khan Bahadoor, more extensively than they are reported in the 20th

Vol. of the Calcutta Series, pages 126 and 127, and Your Memorialists venture to submit that all the arguments used by their Lordships in the Privy Council in favour of the view taken by them are answered in the said Appendix; and the correct theory, supported by arguments not based on abstract precepts merely, but based on a consideration of jurisprudence such as the Privy Council requires, together with a comparative view of the different branches of Mahomedan Law bearing on the subject in question, is set forth in detail with authorities applicable to the question so as to present the law as a harmonious whole without there being any conflict between any two branches of the law such as Gift and Wakf.

16. As regards the arguments used by their Lordships of the Privy Council classified under heads *B. C. D. E. F.* and *G.* referred to in paragraph 10, page 5, of this Memorial, Your Memorialists beg to submit that the antipathy of English Lawyers to perpetuities is based on reasons, the object of which is social and political progress (see quotations from text-writers given in Appendix IV, page 25); but such reasons find no place amongst a community who subordinate all other considerations to religion and to the consideration of *Suwab* or religious merit, and who believe that the best use of property is to make it useful in the world to come. (See arguments in Appendix VIII, para. 4, page 44). If *Suwab* could be obtained by what is not charitable according to the notions of other nations, that cannot be helped as long as the British Government, justly tolerant in matters of religion, does not interfere with articles of faith. Your Memorialists also beg to submit that there is some danger, while dealing with Wakf questions, in mixing up what is the motive of the Wakf with what is the object of the Wakf (see Appendix VIII, paras. 16 and 17, page 48, and para. 19, page 49). The motive must be religious and charitable, that is, to get *Suwab* as contemplated by the Mahomedan Law, and its object is the person or persons to be benefited in the wordly sense; but by a confusion of ideas the character of the motive is transferred to the object; for when it is said that the Wakf must be religious and charitable it is meant that the recipients must be such that, according to ordinary conceptions and the light of natural religion, giving benefit to them must amount to an act of piety; whereas the proper way to look at the question is to to ascertain *what*, according to Mahomedan Law, is the motive, and the answer is *Suwab* or religious merit; then it must be ascertained *how*, according to that Law, the motive is realised, carried out or fructified; and the answer is not only by giving to the poor, which is piety and charity according to all religions, but by doing acts which, according to

notions peculiar to the Mahomedans, amount to piety, that is, by giving to the owner's children, and so forth.

17. Mr. Hamilton is principally responsible for incorrect notions in connection with Wakfs, for he rendered Wakfs or appropriations as meaning always of a pious or charitable nature: but this mistake has been corrected by Mr. Baillie (see Appendix VIII, para. 16, page 48, para. 18, page 49). And in connection with the use of the word charity and charitable objects, Your Memorialists cannot but observe that their Lordships of the Privy Council have lost sight of an institution, which exists amongst the Mahomedans, and in which none but the poor can partake, and from which the relatives and those in affluent circumstances are excluded: that institution is called the *Zakat*. Regarding the true nature of Zakat, Your Memorialists reproduce in Appendix VI, page 27 attached to this Memorial, a passage from Sell's "Faith of Islam," which will shew what that institution means; and the true nature of a Mahomedan Wakf being clearly shewn in this Memorial, and in the notes of argument of Moulvi Mahomed Yusoof, Khan Bahadoor, contained in Appendix VIII, no difficulty will be felt in distinguishing Zakat from Wakf. (See Appendix VIII, para. 10, page 46.)

18. As regards the Texts and Precedents, which their Lordships characterise as being of an abstract character, Your Memorialists beg to submit that those texts must necessarily be of the character attributed to them, seeing that their primary object was to shew the acts which are conducive to *Suwab* or religious merit, it being assumed that Wakf is an institution to dispose of property for the purpose of getting *Suwab* or religious merit (see Appendix VIII, para. 5, page 45). The imperfection in the statement of the Texts and Precedents relied on by the Privy Council is only felt when they are taken by themselves, but when they are taken along with what underlies the law of Wakfs, and the distinction between a Wakf and a Gift, the imperfection vanishes. Moreover, the traditions form a source of Law second only to the Koran, and, therefore, they are binding whether they are abstract or not and whether they are imperfectly stated or not, provided they are accepted and received as genuine and authoritative by recognised Text-writers, who have made the subject of the Traditions the object of their life-long study. Your Memorialists beg to submit in Appendix VII, page 37, extracts from the introduction to Morley's Digest shewing what are the sources of the Mahomedan Law; in what respect and in what veneration the Traditions of the Prophet are held by the Mahomedan world: that those traditions find a very prominent place in the deducation and evolution of the Mahomedan Law; that the

writers such as the authors of the Hedaya, the Futawai Alumgiri, and other works, who have uniformly held in favour of the validity of the Wakf as contended for by your Memorialists, are authors whose works command universal respect, and who have laid down the Mahomedan Law for the followers of Islam as propounded by the *Mujtahids* and Imams, whose business alone it was to construe the *Koran* and the *Hadees*, the duty of the *Mokullids* or followers being simply to receive and act as binding upon them the exposition of the law by the *Mujtahids* and Imams as expounded and laid down by such text-writers. The works of such text-writers should not, therefore, be slightly and contemptuously put aside.

19. As regards the position that the *Hedaya* is against a Wakf in favour of the family, it is not so. (See Appendix VIII, paras. 61 (*k*) and 62, page 58, where the position is refuted.)

20. **Your Memorialists beg to submit that to leave out the theory of *Suwab* or religious merit, and to proceed upon any other test such as that assumed to be involved in the word 'charity,' is to proceed altogether on a wrong track; because, suppose a case of Wakf in all respects perfect according to the requirements of the Privy Council but not involving the idea of *Suwab*, that would be a good Wakf according to the Privy Council, but not so according to the Mahomedan Law: such a case is referred to in Appendix VIII, paras. 56 and 57, pages 56 and 57, namely, where a Mahomedan makes a Wakf which is perfectly good according to the requirements of the Privy Council, and even according to the strict requirements of the Mahomedan Law, but he subsequently becomes an apostate from Islam: according to the Privy Council the Wakf remains a good Wakf in spite of his apostacy from Islam: according to the Mahomedan Law the Wakf falls to the ground, and becomes void; because he ceases to be a fit subject of *Suwab* or religious merit according to the Mahomedan Law. This example is sufficient to shew that considerations other than that relating to *Suwab* are foreign to the question relating to the validity of a Wakf; but this consideration of *Suwab* has been wholly ignored by the Privy Council, and it has been replaced by ideas relating to charity as generally understood in Europe, without the element which, according to Mahomedan notions, is special to it.**

21. Your Memorialists also beg to submit that the institution of Wakf is most common in India; that a very large number of titles are dependent on *Wakfnamahs* of the condemned character, although, as

Mr. Justice Trevelyan at page 208 of the 20th Vol. of the I.L.R. says, "there is no evidence given of the fact in the case." The proportion of Wakf cases, which come up before the Civil Courts, is very small in comparison with the number of Wakfs which are in existence in the country, although nobody ever thought of giving evidence of the proportion. One who knows the country also knows the fact of this proportion.

22. Your Memorialists also submit that the decision of the Privy Council is calculated to foster irreligious ideas amongst the Mahomedans, and to give rise to litigation where litigation was not dreamt of before, *viz.*, the parties to the *wakfnamah* itself might be tempted to question their own acts done in a religious mood of mind, quite forgetting that they have already received consideration in the shape of *Suwab* or religious merit, and the heirs and representatives of those who have made Wakfs might similarly be tempted to question the acts of their ancestors regardless of their fate in the world to come: there will thus be introduced a new source of discord in a family, which otherwise would have lived happily and in peace. This tendency is not based upon imagination but on facts.

23. Your Memorialists also beg to draw Your Excellency's attention to the circumstance that in other nations such as the Hindus, even from wordly motives, immovable ancestral property is inalienable, because "even unborn sons require maintenance" as well as the present generation.

24. Your Memorialists also beg to submit that it will not be conducive to the political welfare of India to see old entire Mahomedan houses existing in full prosperity broken to pieces; and this is the inevitable result of the Mahomedan Law of Inheritance, according to which, after the death of the owner, property is divided into fragmentary portions In fact, one of the causes of worldly decay amongst the Mahomedans is their Law of Inheritance. The institution of Wakfs affords a remedy even from a worldly point of view, where the result of the Law of Inheritance is likely to work prejudicially.

25. That another fallacious notion which appears to Your Memorialists to have strongly biased the Calcutta High Court in the views expressed by them regarding the validity of the Wakfs in question is founded upon a nervous dread that such Wakfs are either promotive of fraud or spring from a fraudulent intent. Your Memorialists, speaking with the profoundest respect, beg to mention that this notion or dread, by whatever name it may be called, is due to a confusion of ideas, and owes its origin to an incorrect apprehension of the Mahomedan Law; for if the Mahomedan Law is properly considered,

it will be seen that it provides the amplest safeguard against any fraud. It provides that if a man, heavily involved in debt, makes a Wakf, whether in favor of his descendants or for any other religious purpose, and dies without leaving any assets, the Wakf would be avoided, and the property would be sold for the satisfaction of his debts. It provides further that, if a man heavily involved in debt makes a Wakf of any kind with the object of throwing his creditors into "delay" (*mumatilat*), the Wakf would not take effect until after the debts have been discharged. It provides also that when a property is hypothecated to another, and subsequently dedicated as Wakf, the latter disposition will be subject to the claim of the mortgagee. So far, therefore, there is no warrant for saying that the Mussulman Law gives any countenance to Wakfs in fraud of creditors. But when a man is wholly *unindebted*, and there is no claim of any person upon his property, the Mussulman Law, like every other system of law, provides that the owner may dispose of it *inter vivos* in any way the law authorises him to do so. He may give it absolutely to any human being, which is *hiba* or gift; or he may give it absolutely to God, which is Wakf. In both these cases, the right of the donor ceases absolutely when once the donation has been actually made. In case of a dedication to the Almighty the dedicator is allowed to condition *how* the usufruct should be enjoyed and *who* shall enjoy it. And therefore a Wakf is defined as—

Implying "the relinquishing the proprietary right in any article of property, such as lands, tenements, and the rest; *and consecrating it in such a manner to the service of God that it may be of benefit to men*, provided always that the thing appropriated be, at the time of the appropriation, the property of the appropriator, ...(1 Select Reports, page 17)."

But the property remains always the property of God, and can never be resumed or revoked by the donor or his heirs, or affected by his or their subsequent conduct. This, Your Memorialists submit, is the real principle of the Mahomedan Law, which they are grieved to find has been wholly misunderstood or overlooked by the Courts on this side of India, with results so disastrous to the Mahomedan Community.

26. That as Your Excellency in Council is aware, the Bombay High Court has affirmed the validity of such Wakfs; and though, whilst doing so, it has made a slight variation from the recognised Hanafi law, *viz.*, in requiring that the unfailing purpose should be expressly mentioned: there is some warrant for this view, in the isolated opinion of one Mahomedan jurist (Imâm Mahomed). But the enunciations of the Calcutta High Court, Your Memorialists beg to

state with the greatest deference, are in absolute conflict with the Mahomedan Law of every school and of every sect.

27. That Your Memorialists understand that, under the English Law itself, subsequent creditors have no right to question the lawfulness of a disposition made by a person previous to his indebtedness. The same principle is in force in the Mahomedan Law: a man makes a disposition by *hiba* or Wakf, when he is free from debts, which disposition he lawfully effectuates, thus destroying all right of private property; his subsequent indebtedness surely cannot affect the validity of the previous disposition apart from any question of concealment or fraud. It may be that a man constitutes a particular property as Wakf, and keeps the dedication concealed, and subsequent thereto induces outsiders to give him credit on the security of the same property. The Mahomedan Law provides its own remedy for such cases. But the Courts which have held against such wakfs do not proceed upon the ground of concealment of fraud in specific cases. They lay down the general rule that a Wakf, constituting the members of the dedicator's family as the beneficiaries thereof, is invalid. Your Memorialists submit that in administering any system of law, it is the duty of the Courts to find out what that law is, and not to attempt to evolve rules unrecognised by that system.

28. Under the Mahomedan Law, a Wakf must be either impliedly or expressly perpetual. Baillie's Digest, page 575, Ameer Ali's Mahomedan Law, Volume I, page 186. Perpetuity is therefore of the essence of a Wakf, and consequently no notion founded on the purely English doctrine against perpetuities should be allowed to bias the judicial determination of questions arising under the Mussalman law. It would be most dangerous and acting contrary to the spirit of the British rule in India, and the well-established practice of the Indian courts, confirmed by their Lordships of the Privy Council, if, in questions of Wakfs, an institution essentially religious in its nature and clearly defined in the Islamic Law itself, a technical rule of English Law of doubtful public policy were allowed to control the judgments of learned judges before whom the question happens to be litigated. It is besides common knowledge that in this country there exist many purely secular settlements of property in the nature of inalienable Rajs and Zemindaris, fully recognised in law, and yet offending against the English rule relating to perpetuity; that, as Your Memorialists have already ventured to observe, the law of Wakfs, one of the most cherished commandments of their Prophet, forms the foundation of their prosperity as a community, and serves to impart a stability and security to their benefactions and their families, which would otherwise be

completely wanting. It would be superfluous on the part of Your Memorialists to point out how necessary the existence of such families is to the well-being of the community and the State; how disastrous it would be for the general Mahomedan population, and how prejudicial to the best interests of good government if they should happen to be swept away, and their properties to pass into the hands of speculative money-lenders.

29. Your Memorialists also beg to submit that the necessarily inadequate consideration, which the Privy Council must have, from the very nature of things, bestowed upon the various branches of the Mahomedan Law bearing on the subject of Wakfs as compared with the deep consideration of the whole of the Mahomedan Law by *Moojtahids*, Doctors and Divines such as Aboo Haneefa, Aboo Yusoof and Mahomed, was not calculated to lead with certainty to the conclusion that the Mahomedan Law of Wakfs could not be such as contended for by your Memorialists, on the ground alleged that such a view of the Mahomedan Law of Wakfs was inconsistent with the Mahomedan Law of Gifts. As already submitted, the Law of Gift, if properly understood and differentiated from the Law of Wakf, affords no room for such a conclusion. And any seeming inconsistency between the Law of Wakf and the Law of Gift such as that indicated above should not lead to the conclusion that *Moojtahids* of such light, learning and authority as Aboo Haneefa, Mahomed and Aboo Yusoof were wrong—a conclusion which necessarily follows from the decisions of the Privy Council; because those learned *Moojtahids* have held in black and white that the Wakf condemned by the Privy Council is valid. When the Privy Council asked for authority, Your Memorialists submit that the true answer was that the writings of the *Moojtahids* constituted authority absolutely binding on all the *Mookullids* or followers. How vast should be the knowledge of a *Moojathid* and what he must know before he becomes a *Moojtahid*, Your Excellency will find from a quotation from Sell's work contained in Appendix VI, page 27. It is common knowledge that the word of the *Moojtahid* and his exposition of the law are binding on his followers, and the same must be given effect to by the Kazee. If once it becomes known broadly that the highest court has laid down that the *Moojtahids'* views are not binding on the Mahomedan subjects of Her Majesty the Queen-Empress of India, and that everyone is free to evolve a tenet for himself, the political and religious consequences will be serious: everybody would be free to construe the Mahomedan Law according to his own light; the *Moojtahids'* views would be cast aside, and everybody would be his own master. What is here said of the *Moojtahids* can be said with

equal force and relevancy of the Text-writers, such as the author of the *Hedaya* and other works, where the law has been uniformly laid down as contended for by Your Memorialists. Such Text-writers have spent the whole of their lives in the pursuit of knowledge and in the study of Mahomedan Jurisprudence, disdaining altogether worldly honour and preference. Notwithstanding all the pains they have taken, and all the austerities which they have practised, still they have not attained the necessary degree in knowledge and learning so as to be entitled to the dignity of *Moojtahids*. But there is enough in their works to justify the universal conclusion that they have correctly laid down what the *Moojtahids*' views were upon questions of Mahomedan Law. The Acts of the Legislature preserve the Mahomedan Law to the Mahomedan subjects in great many matters, and the Privy Council say (and Your Memorialists are extremely grateful to them for saying so) that Wakf is included in those matters. Such being the case, the question is, where is the Mahomedan Law to be found. The answer to it is to be found in those Text-books which correctly represent the views of the *Moojtahids* and Imams, who have based their views on the correct sources of the Mahomedan Law, which are the Kooran, the Traditions or Hadis, and the Ijma and Kyas. These Text-books themselves constitute authority. To ask for authority for those Text-books is to ask for authority for authority. To disregard the Text-books and the exposition of the law laid down by the *Moojtahids* in accordance with the Traditions of the Prophet, is to sweep away the whole of the Mahomedan Law, and that has been done in this particular case on a misconception of the Law of Wakfs, and on an irrelevant application of analogies from the law of Gifts, and on an erroneous meaning of the word *charity*. In paragraph 39 at page 53 of Appendix VIII will be found in unmistakable and unambiguous language, the positive rule laid down by Aboo Yusoof as guide on the subject in question. The Privy Council in ignoring that rule in effect say to Aboo Yusoof "You, Aboo Yusoof, are wrong in the rule of law laid down by you on the subject of Wakfs, because that view is in conflict with the Mahomedan Law enunciated by you on another subject, *viz.*, the subject of Gifts, and the same is also in conflict with our view on the question of Perpetuities. Therefore whilst laying down the law on the subject of Wakf you have forgotten the Mahomedan Law on the subject of Gift and also ignored our rule of policy based on Perpetuities."

30. Your Memorialists, therefore, beg to submit the following propositions:—

I. That gift is a disposition essentially different in its nature, from *Sudka* or Wakf, and therefore there could be no analogy

between a gift and a wakf. (See paragraph 11 of this Memorial, page 6, and paragraphs 5 and 6 of Appendix VIII, page 45.).

II. That the creation by means of gift of a succession of life-estates is forbidden not because the Mahomedan Law looks with disfavour upon perpetuities but for a different reason. (See paragraphs 1, 2, page 44, and 13, page 47 of Appendix VIII).

III. That the prohibition against perpetuities in other systems of Jurisprudence is based on reasons which do not obtain in the Mahomedan Law. (See paragraph 3 of Appendix VIII, page 44).

IV. That *Suwab* or religious merit is equally valuable with and in fact more valuable than property in a wordly sense. (See paragraph 11 of this Memorial, page 6, and paragraph 8, page 45, and paragraph 9, page 46 of Appendix VIII).

V. That texts, supposed to be of an abstract character, and precedents supposed to be imperfectly stated, proceed upon the assumption that religious merit or *Suwab* is a valuable consideration, its value being estimated with reference to God's favour in the world to come. The object of those texts and precedents is to point out by what acts religious merit can be acquired. (See paragraph 18 of this Memorial, page 10, and paragraph 53 of Appendix VIII, page 56).

VI. That a consideration of the law of Wakf, by ignoring the Mahomedan idea of religious merit, and by subverting the rules which, according to Mahomedan Law, point out how religious merit is to be acquired, is a non-Mahomedan mode of dealing with the question. (See paragraph 8 of this Memorial, page 4, and paragraphs 16 and 17 of Appendix VIII, page 48).

VII. That for the purpose of finding what acts lead to religious merit, one must confine himself to the Mahomedan Law, and should not be guided by notions derived from other and more familiar systems; hence the meaning of the word *charity* must be gathered from the texts and precedents referred to in the Mahomedan Law and in the Mahomedan Law only. (See paragraphs 9 and 17 of this Memorial, pages 5 and 10, and paragraph 19 of Appendix VIII, page 49).

VIII. That the consequence of dissociating the consideration of religious merit from the consideration of the Wakf of a Mahomedan, would be to render valid a Wakf which is not so under the Mahomedan Law: as for instance the Wakf of a Mahomedan who turns an apostate from his religion. (See paragraph 20 of this Memorial, page 11, and paragraphs 55, 56 and 57 of Appendix VIII, pages 56 and 57.)

IX. That the researches of Europeans who have applied themselves to the questions have established that the practice in Mussal-

man countries in regard to Wakfs and the law relating to Wakfs which obtain in those countries, are in favour of the validity of Wakfs declared to be illegal by the Full Bench and the Privy Council. (See paragraphs 4 and 5 of this Memorial, page 3, and Appendices I, II and III, pages 18, 20 and 23).

X. That it is incorrect to suppose that the authority of the *Hedaya* was against a Wakf on one's self and children. (See paragraph 19 of this Memorial, page 11, and paragraphs 61 (*k*) and 62 of Appendix VIII, page 58).

XI. That the confusion which sometimes arises in the consideration of the motives of a Wakf and its object ought to be avoided. (See paragraph 16 of this Memorial, page 9, and paragraphs 16, 17 and 19 of Appendix VIII, pages 48 and 49).

XII. That there being only four sources of the Mahomedan Law, and current of decisions not being one of them, if the current however strong is against the Mahomedan Law, that current should be diverted to the right channel, instead of the Mahomedan Law being diverted so as to flow with the current, and thus flow into a wrong channel. But in regard to Wakfs that current is not an uninterrupted current. (See paragraph 14 of this Memorial, page 8, and paragraph 66 of Appendix VIII, page 61).

XIII. That perpetuity can be traced amongst other nationalities in India whose ancestral immoveable property is inalienable. (See paragraph 23, 24 and 28 of this Memorial, pages 12 and 13).

XIV. That the result of the Mahomedan Law of Wakfs is, to a certain extent, to remove the injurious consequences arising from minute sub-divisions of property when left to the operation of the ordinary law of Inheritance. (See paragraph 24 of this Memorial, page 12).

XV. That political considerations likewise point to the desirability of maintaining in compactness and unity some of the great Mahomedan houses and families in which property is held entire and indivisible under the law of Wakf. (See paragraph 28 of this Memorial, page 13).

XVI. That in order to ascertain the Mahomedan Law of Wakfs, you should ascertain on what points the Mahomedan lawyers are agreed in regard to the question of Wakfs, and on what points they disagree, instead of introducing a new point of view from which look at the Mahomedan Law of Wakfs. (See paragraph 19 o Appendix VIII, page 49).

XVII. That the points relating to the Mahomedan Law of Wakf wherein all the three Imams are agreed are sufficient to solve the

question under consideration; and it cannot be laid down that their consideration of the question must be defective because it contravenes some other portion of the Mahomedan Law which has no connection with the law of Wakfs, such as the law of Gifts. (See paragraph 29 of this Memorial, page 14, and paragraph 19 of Appendix VIII, page 49).

XVIII. That the way to arrive at a correct conclusion as to what is actually the Mahomedan Law upon a certain question is to find out how the Mahomedan Law has been laid down by its propounders who are the Imams, and by the Text-writers who are its exponents, instead of finding out how it ought to have been laid down according to European ideas and views. (See paragraph 20 of this Memorial, page 14, and paragraph 66 of Appendix VIII, page 61).

XIX. That the institution of Wakf lends no countenance to the hypothesis that that institution encourages chicanery and could be used as a machinery to defeat the just rights of *bond-fide* creditors. (See paragraphs 25 and 27 of this Memorial, pages 12 and 13, and paragraph 14 of Appendix VIII, page 47).

XX. That to lay down the Mahomedan Law in a manner inconsistent with what is laid down by the Imams and expounded by the Text-writers is to propound the Mahomedan Law in a manner not binding on the conscience of Her Majesty's Mahomedan subjects. The conflict between conscience and conduct should be avoided. (See paragraph 14, page 8 of this Memorial, and paragraph 35, page 32 of Appendix VIII: see also Appendix V, page 26).

31. That, under the circumstances detailed above, Your Memorialists feel it their duty to address this earnest appeal to Your Excellency in Council to save their community from further destruction, and to restore to the Mahomedans of India the undisturbed enjoyment of an institution entirely religious in its character and origin, and with which are intimately associated their dearest religious interests and feelings, and which is based upon the clearest ordinances of the Prophet, and supported by an uninterrupted series of decisions and opinions of the most eminent Mahomedan Muftis, Kazis and Jurists, dating from the very birth of Islam, and in accordance wherewith innumerable settlements of properties have been effected throughout the length and breadth of India, so that the institution of Wakfs has taken a deep and abiding root in the social and religious organisation of the Community, and cannot be injured without shaking Moslem Society to its very basis; and thus to reassure the Mussalman subjects of Her Majesty the Queen Empress, who have been ever royal in their devotion to the British rule, that the British Government still adheres to that cardinal principle of

its administration, which guarantees to every class and creed of Her Majesty's subjects enjoyment of their own laws and religion.

32. Your Memorialists therefore most humbly pray that Your Excellency in Council may be pleased to pass an Act restoring to the Mussalman subjects of Her Majesty the Queen Empress the law of Wakfs as cherished and understood by them, that is to say, an Act *declaring the validity of* Wakfs *created by a Mahomedan constituting his children and descendants and kindred the immediate recipients of the benefaction;* in fact, to codify the law as it is to be found in the *Hedaya*, the *Fatawai Alumgiri* and other Text-books; or take such other steps for that purpose as may seem fit and proper.

And Your Memorialists, as in duty bound, shall for ever pray.

No. 9.—Appendix I to the Memorial; being a reproduction of the views expressed by Sir W. Comer Petheram, the late Chief Justice of Bengal, on the Mahomedan Wakf question from the "Law Quarterly Review" for 1897, to be found at page 383 of Vol. XIII of that Review.

**Mahomedan Law of Wakf.*

The question what is or is not a valid wakf according to Mahomedan law first came before me judicially in the year 1892 in the case of *Shuk Lal Podar* v. *Bikani Meah*. Mr. Justice Hill was sitting with me at the time, and as we found that there were two decisions of the court on the subject which appeared to us to be in conflict, we thought it right to refer the question to a full bench. The two cases are *Russomoy Dhur Chowdhry* v. *Abdul Fata Mahomed Ishak*, I.L.R., 18 Cal., 399, decided on February 24, 1891, by Tottenham and Trevelyan JJ., and *Meer Mahomed Isral Khan* v. *Sashti Churn Ghose*, I.L.R., 19 Cal., decided by O'Kinealy and Ameer Ali J.J., on March 18, 1892. In the first case the learned judges held that a wakf cannot be sustained unless the property is dedicated solely or, at least, primarily and substantially to religious or charitable objects. In the second case it was held that a wakf in favour of settler's children and kindred in perpetuity with a reservation of the whole income in favour of the settler himself for life was valid. The question was afterwards argued before a full bench of which Mr.

* Referred to in paragraph 4, page 3, paragraph 11 (h), page 7, and paragraph 12, page 8, of the Memorial.

Justice Ameer Ali was a member, when three out of the five judges who composed the bench, took the view which had been taken in the first case, and Mr. Justice Ameer Ali adhered to the opinion he had expressed in the second. I thought that the particular case before us was concluded by the judgment of the Judicial Committee in the case of *Mahomed Ahsanulla Chowdhri* v. *Amar Chand Kundu*, I.L.R., 17 Cal., 498, delivered on November 9, 1889, in which the Committee ruled that in order to create a valid wakf according to Mahomedan law there must be a substantial and not an illusory gift of the propety to charitable uses, but declined to decide whether or not a gift of the property to charitable uses which was only to take effect after the failure of all the granter's descendants would be illusory. An examination of such Mahomedan books as were then accessible to me raised a doubt in my mind whether the decision of the Judicial Committee was in accordance with Mahomedan law as administered in Mahomedan countries, and an examination of the decision of the various courts in British India led me to think that until the decision of the case of *Amrita Lal Kalidas* v. *Shaik Hassan*, I.L.R., 11 Bombay, 492, by Mr. Justice Farran at Bombay on March 11, 1887, no one in India had suggested that a wakf under which the income of the property was reserved for the benefit of the founder for his own life, and after his death for that of his descendants in perpetuity, was not valid according to Mahomedan law. This impression was greatly strengthened by the fact that in the Tagore Law Lectures which were delivered by a Hindoo, Babu Shama Churn Sircar, in 1874, the doctrine is stated as clear and undisputed. In the judgment which I then wrote I endeavoured with all possible respect to indicate the doubt which existed in my mind. Afterwards on November 23 and December 15, 1894, the same question was again considered by the Judicial Committee, when the case of *Russomoy Dhur Chowdhri* v. *Abdul Fata Mohamed Ishak*, I.L.R., 22 Cal., 617, came before them on appeal from Tottenham and Trevelyan JJ. The Committee then re-affirmed their decision that the property in question must, in substance, be devoted to charitable purposes in order to make it a valid wakf according to Mahomedan law; and further laid it down as a principle of Mahomedan law that a provision for the poor after the total extinction of a family would be illusory. The effect of this decision is that any wakf under which the founder has reserved the income to himself for life and after his death to his descendants, cannot now be sustained in British India, and all rights and interests created and enjoyed under such wakf are destroyed. The decision of both points was necessary for the

decision of the case, and the ruling is, of course, binding on every judge in British India. The judgment of the Judicial Committee as delivered by Lord Hobhouse contains a passage for which I am sure the inhabitants of India, as well Hindoos as Mussulmans, will be grateful. It is as follows :—'Among the very elaborate arguments and judgments reported in Bikani Meah's case, some doubts are expressed whether cases of this kind are governed by the Mahomedan law, and it is suggested that the decision in Ahsanulla Chowdhri's case displaces the Mahomedan law in favour of English law. Clearly he Mahomedan law ought to govern a purely Mahomedan disposition of property.' After the judgment of the full bench had appeared, the subject was a good deal discussed by Mahomedans in India, and I was struck by the fact that every Mahomedan who spoke to me on the subject agreed with Mr. Justice Ameer Ali, and they all, both lawyers and laymen, asserted that there was no doubt that a wakf, as understood by Mahomedans, was such as he had described it in his judgment. At about the same time I had conversation on the subject with a gentleman who then occupied a very important position in the Government of India, but who had spent many years in official ipositions in Mahomedan countries. He assured me that the law, as laid down by the majority of the full bench, was not in accordance with the Mahomedan law, and that it was within his own knowledge that a very large proportion of the land, both in Turkey and Egypt, was held under family settlements created by way of wakfs constituted and conditioned in the way which Mr. Ameer Ali asserts is lawful according to Mahomedan law. As the matter appeared to me to be of considerable importance, I have thought it worthwhile to endeavour to ascertain how the law on the subject is understood and administered at the present time by Mahomedan judges in Mahomedan countries, and have quite easily obtained two French translations of books which appear to deal with the whole subject, and to indicate how the institution is regarded in Turkey, Arabia and Egypt. The title of one of these books is 'Droit Mussulman. Le Wakf ou Immobilisation d'après les Principles du Rite Hanifite. Traduit de l'Arabe par MM. Benoit Adda, Avocat, et Elias D. Ghalioungui, Interprète.' It was published at Alexandria in 1893 and contains two parts. The first part is a translation of an Arabic book written about 1489 A.D. The second, of an Arabic book written in the early part of the present century. I think it worthwhile to quote here one passage from the translator's preface, though perhaps, after the authoritative dictum, which I have already quoted, the proposition will not be disputed. They say (page 8): 'Nous espérons que notre ouvrage sera d'une utilité

pratique non seulement en Egypte; mais aussi dans tout l'Orient, car partout où règne l'Islamisme ce sont les mêmes us et coutumes qui sont en vigueur, et c'est avec raison que le savant orientaliste Docteur Worms a dit dans ses recherches sur la constitution de la propriété territoriale dans les pays Musulmans: "Tous les empires Musulmans ne sont que des fractions d'une même société soumise à la même Loi, au même Code administratif et politique, et où tout est identique et common jusqu'aux coutumes les moins importantes."' This book does not contain any such clear statement on the subject as that which I shall presently quote from the other, but from beginning to end it deals with the institution on the assumption that for a person to make a provision for his descendants is a good work, and is one to which a wakf may be properly devoted. The other book is a translation of a book written in Turkish and published in Constantinople in 1890. Its title is 'Lois régissant les Propriétés dédiées (Awkafs). Par Omar Hilmy Effendi. Tr. du Turc par C. G. Stavoidès and Simon Dahdah, 1895.' The following extract from the translator's preface will explain the writer's position and the character of the book:—

'Feu Omar Hilmy Effendi, Président de la Chambre Civile á la Cour de Cassation, a codifié toutes les lois, tous les édits et rescrits impériaux qui régissent les Awkafs dans l'Empire Ottoman et il a appelé son ouvrage: *Ithaf Ut-Akhlaf Fi Ahcam Il Awkafs*, c'est-á-dire: "Présent fait á nos successeurs des lois qui régissent les Awkafs." Ce livre a été imprimè par la Faculté de Droit de Stamboul; c'est dire qu'il avait été soumis au préalable à l'approbation des sommités juridiques officieilles de l'Empire. Par conséquent, ou peut considérer ce livre comme un véritable code, reconnu, des Awkafs. Aussi, nous avons cru rendre service aux juristes de l'Europe, qui s'occupent des lois musulmanes et à tous les Européens qui possédent des immeubles en Turquie, en le traduisant du turc en français.'

The book is divided into chapters and articles. Articles 77 and 92 are as follows:—

'Art. 77. Il est nécessaire que l'œuvre pour laquelle est fait un wakf soit, dans son essence et dans l'intention de l'instituant, une œuvre pie. C'est pourquoi, lorsque cette œuvre ne l'est pas, le wakf est nul. Mais, si elle l'est dans son essence, sans l'être dans l'intention de l'instituant et vice versa, le wakf est nul.

Art. 92. La clause d'après laquelle l'instituant d'un wakf en affecte le bénéfico à sa personne et à ses enfants ne vicie point la validité du wakf. Exemple: si quelqu'un fait wakf sa maison à condition que son revenu ou que son usage lui appartiennent durant sa vie et qu'aprés sa mort ils reviennnent à ses petits-enfants, le wakf est

valable et la condition est exécutoire. De même si quelqu'un en faisant wakf sa propriété met la condition que le produit de ce wakf serve à payer ses propres dettes, le cas échéant, le wakf est valable et la condition est exécutoire.'

Chapter iv. is entitled—'Des conditions mentionées par les instituants des wakfs.'

'Sect. Ire.—Des conditions dans les wakfs en faveur des enfants, des parents et des voisins.'

This section deals with the institution on the clear assumption that a provision for the benefit of the founder himself and his descendants is an 'œuvre pie within the meaning of Art. 77, and it, and indeed the whole book, would seem to support the view of the institution taken by Mr. Justice Ameer Ali.

As I have said before, I think the matter one of considerable importance; and as I know that it is considered of vital importance by the Mahomedan community in India, I have thought it worthwhile to draw attention to these facts and authorities in order that when the matter is again brought before the Judicial Committee, as will certainly be the case, the counsel who argue it, and the judges who decide it, may, if they please, be in a position to ascertain how such a question would be dealt with by a Mahomedan Court in a Mahomedan country.

W. C. PETHERAM.

No. 10.—Appendix II to the Memorial; being a Report of the Proceedings in the House of Lords, dated the 29th June, 1896, in regard to the question of the Validity of Wakf according to Mahomedan Law. (A reprint of an Extract from the Parliamentary Report No. 6 for August, 1896, from pages 55, 56, and a part of 57 of Volume VII, No. 8, of a Publication entitled "India.")

Imperial Parliament, June 29th, House of Lords, Mussulman Law in India.

LORD STANLEY OF ALDERLEY rose to ask whether the Secretary of State for India was aware of the alarm prevailing among the Mussulman subjects of her Majesty in India, owing to a recent decision of the Judicial Committee of the Privy Council in the case of Abdul Fata Mahomed Ishak and others *versus* Russomoy Dhar Chowdry and others, the effect of which was to abrogate an important branch of the

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Referered to in paragraph 5, page 3, of the Memorial.

Mussulman law—namely, that relating to family wakfs, or the law relating to the creation of benefactions for the endower's family, with the reversion for the general poor; whether it was not the fact that the full enjoyment of their law and religious usages and institutions, so far as they did not conflict with any statutory enactment, has been guaranteed to the Indian Mussulmans by her Majesty's Proclamation. The law in question related to one of their most cherished institutions, upon which depended the prosperity of their principal families, which had rendered important services to the State in times of danger; whether it was not the fact that numerous memorials had been presented to the Indian Government against this judicial decision; and whether they have not prayed for a declaratory Act declaring the validity of the law which had been held to be invalid; and what steps the Government propose to take to redress the wrongs inflicted by this decision of the Privy Council. The noble lord said that he regretted having to differ from the opinions of the noble lord (Lord Hobhouse), and he regretted having been told by him that he thought this question of wakfs was dead, since it was as lively as ever, and the noble lord might have remembered that "the evil that men do lives after them." The notice on the Minutes had been prepared about last July, at which time memorials against the Privy Council judgment had been sent in to the Indian Government. This notice had been put on the Minutes in August and September last, so that there had been ample time for obtaining some of these memorials. He would, perhaps, be told that no memorials had been received at the India Office. This was most likely, if they had not been asked for, and after the notice last September, they ought to have been asked for; and the Indian Office ought to be ready with an answer to the question as to these memorials. The Mussulmans, however, were not the only persons aggrieved by the attitude recently taken by the Indian Administration, with regard to family settlements. The Hindus also had reason to complain of a decision in what was called the Tagore case. He had always felt the highest respect for the Judicial Committee of the Privy Council, and he voted against his inclination and against a Resolution moved in 1872 by the late Earl Stanhope, and supported by the noble Marquis now at the head of the Government, on the occasion of the appointment of the late Sir Robert Collier to a seat on that Bench, because of the high opinion that was entertained at the time of the judicial capacity of that learned gentleman. He did not remember ever having read or heard of anything to diminish the judicial reputation of Sir Robert Collier during all the time that he sat in the Privy Council. During that debate in 1872 the noble

Marquis (the Prime Minister) had blamed the parsimony of Mr. Gladstone's Government, which had given too low a salary for the Privy Council Judgeships, and if the salaries then fixed were still insufficient, he hoped her Majesty's Government would make them such as to secure a first-rate man for the next appointment to the Judicial Committee. He could not help thinking that the decision of the Privy Council, to which he was now calling attention, was likely to jeopardise the reputation of the Judicial Committee. Some decisions might err from the judges not being sufficiently informed on the subject before them, but in this case the decision quoted several very good authorities, but only for the purpose of disregarding them. Syed Ameer Ali was an authority before he became a High Court judge at Calcutta. The judgment quoted from him frequently, and its reasons for differing with him were, to say the least, extraordinary. The judgment said: "The opinion of that learned Muhammadan lawyer is founded, as their lordships understand it, upon texts of an abstract character, and upon precedents very imperfectly stated. For instance, he quotes a precept of the Prophet Muhammed himself, to the effect that 'A pious offering to one's family to provide against their getting into want is more pious than giving alms to beggars.'" Further on the judgment said: "These precepts may be excellent in their proper application. They may, for aught their lordships know, have had their effect in moulding the law and practice of wakf as the learned judge says they have." This last sentence ought to have run as follows: "These precepts, as their lordships very well knew, had moulded the law and practice of wakf." This point, as to which the Court professed ignorance, was proved by language. The judgment used the word "Muhammadan" instead of Mussulman" as to communities. He did not complain of this, since it was an ordinary English phrase; but as a matter of fact, the adjective "Muhammadan" was never used in any Mussulman country or language except with reference to and to describe the law founded by the Prophet, which was named "Sheriat i Muhammadiyeh," so that Muhammadan law was correct, and a Muhammadan community an incorrect expression. Besides the precepts quoted by Syed Ameer Ali, other sayings of the Prophet showed that he recommended charity to the family and dependents of a man in preference to more distant poor. Abu Hurairah said a man came to his Highness (to ask about alms and charity) and said, "I have got one dinar," he said, "expend it upon yourself;" the man said, "I have got another dinar," the Prophet said, "expend that upon your children." The man said, "I have got another dinar." He said, "expend that upon your relations, your women, father and mother."

He said, "I have got another dinar." The Prophet said, "expend that upon your servants." The man said, "I have got another dinar." He said, "You know best the condition of the person most worthy of it, and whoever you know to be so give it." (Mishcat ul Musabih, Calcutta, 1809, Volume I., page 455). This judgment of the Judicial Committee appeared to have gone wrong, because it failed to be distinguished between gifts and wakfs. Gifts in perpetuity, it said, were forbidden by Mussulman law: this is true; but the essence of wakf was its perpetuity. The judgment quoted an opinion of Mr. Justice Farran which showed this: That judge had described a settlement as "a perpetuity of the worst kind which would be invalid on that ground unless it can be supported as an okfnameh." The Privy Council judgment was very near arriving at a correct interpretation and decision when it declared:—Whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settler says that they are made as wakf, in the name of God, or for the sake of the poor. To these questions no answer was given or attempted, nor can their lordships see any." They ought to have seen the answer for the judgment mentioned in the law book "Hedaya." This book was translated and published by order of the Bengal Government in 1791, and a new edition of it was published in 1870. This authority said (page 234):—"An appropriation (or wakf) is not complete according to Hanifa, unless the appropriation destine its ultimate application to objects not liable to become extinct; as when for instance a man destines its application ultimately to the use of the poor (by saying I appropriate this to such a person, and after him to the poor), because these never become extinct." So that when the judgment said, "Their lordships agree that the poor have been put into this settlement merely to give it a colour of piety, and so to legalise arrangements meant to serve for the aggrandisement of a family," their lordships appeared to have been ignorant of what was laid down in a law book that was one of the best known in India, and to have imputed to the settlers as a colourable regard for the poor what was in fact a legal technicality. Whatever fault might be found with this judgment, the merit of great candour must be conceded to it. It stated that this Board in Ahsanulla's case adopted the view of Mr. Justice Kemp to the effect that provision for the family out of the grantor's property might be consistent with the gift of it as wakf. It also cited the judicial opinion of Mr. Justice Ameer Ali in Bikani Meah's case, a dictum of Sir Raymond West in the Bombay High Court, and a decision of Mr. Justice Farran in the same Court—all these contrary to this judgment. Mention had often

been made of those who were *Plus Royalistes que le Roi.* In this case the India Office appeared to pose as a more strenuous supporter of Mussulman law than the Indian Mussulmans or the Turks of Constantinople, by denying the legality of such wakfs. The last time he was at Constantinople, which was six or seven years ago, before these cases had arisen in India, he had heard of similar wakfs, or family appropriations in Constantinople, and a few days ago he met a Turkish diplomatic agent who had confirmed the existence of many such Wakfs at Constantinople. Some writers said that Mussulman law was not sufficiently elastic, and that it was only suited to primitive communities. The Indian Administration and the Privy Council Judges were in these cases endeavouring to deprive that law of the elasticity it did possess; and with regard to the latter accusation, all the practices of the Liverpool Produce Exchange were forbidden in Mishcat ul Musabih. He had lately read a French historian's comment on judicial decisions during the reigns of the Stuarts, and their base subservience to the Government. He thought that a future historian reading the Privy Council judgment and the communication he had received from the India Office would infer similar pliancy on this occasion. For his own part he would be more inclined to impute obstinacy than pliancy to the noble lord who had delivered the judgment. But whether the legal or executive officials in India were at fault in this matter, it would be easy to remedy it, if the Secretary of State would order a Declaratory Act to be passed in the sense petitioned for in some of the memorials. He thought he had shown that the judgment of the Judicial Committee was not in accordance with Mussulman law, neither was it in accordance with Christian law. When their lordships so lightly dismissed the precepts quoted by Mr. Justice Ameer Ali, they might have remembered that there was not much difference between them and the eighth verse of the fifth chapter of the 1st Epistle of Paul to Timothy. "But if any provide not for his own and especially for those of his own house, he hath denied the faith and is worse than an infidel." Perhaps, as St. Paul lived 600 years earlier, the Privy Council judges who thought the precepts of the Prophet too old, would think still less of St. Paul's precept. A case had, however, been decided this year in one of Her Majesty's Law Courts in London, by which a will leaving some thirteen thousand pounds to the poor had been upset. It was true that this was due to a technicality, but the satisfaction with the decison had been general, because the testator had left five relations unprovided for, one of whom was in the work-house, and two others on the verge of it. He now came to the last two paragraphs of the Notice—questions addressed to the Under Secretary for India, as to what steps

the Government of India would take. A correspondence had been going on in the *Moslem Chronicle* of Calcutta showing the interest taken in this question. A pleader, Mahomed Mustafa Khan, had written a letter, dated May 11th, from the Vakil's Library, High Court, in the *Chronicle* of May 23rd last. This letter repudiated the views urged in another letter of Mr. Iradut Ullah in the *Chronicle* of May 9th. After pointing out that for a Mussulman to propose to repeal divine law by human legislation would be apostacy, he ended his letter in the following words, and he entreated the noble earl to give his attention to them: "The wakf question, however, stands on a different footing, and its administration by our Courts has, to a great extent, certainly been unsatisfactory. Even here our Courts profess to expound the Muhammadan law, but we say 'No,' this is not our law, and we have now appealed to the Government to put our Courts right by legislation. But the difference in the two legislations proposed is that, while in the wakf question we want an Act confirming the Muhammadan law disturbed by our Courts, Mr. Iradut Ullah wants an Act disturbing Muhammadan law heretofore rightly administered." These few words summed up the whole question. It would be preposterous if the answer were that the India Office could not interfere, after the Secretary of State had interfered with the Government of India in an unprecedented manner by a Mandate to alter the cotton duties, in order to redeem the electioneering pledges which he had incautiously given to Lancashire.

THE EARL OF ONSLOW: It is the fact that full enjoyment of their law and religious usages and institutions has been guaranteed to the Mussulman population of India by Her Majesty's Proclamation; but the case to which the noble lord has called attention was decided by the Privy Council strictly in accordance with the Mussulman law. It was a case in which a remainder to the poor was inserted merely for the purpose of perpetuating a bequest to the family of a testator, and in accordance with the Mussulman law it was held by the Privy Council not to be valid. The noble lord asks whether it is not the fact that numerous memorials have been presented against this decision. The India office is not aware that any memorials have been presented, and it is quite certain that they were not numerous. It may be that the parties in this case may have presented a memorial, but no others are known of. The Government of India does not purpose to take any steps to redress the wrongs which the noble lord imagines to have been inflicted by the decision; and if any representation is made on the subject, it should be to the local government, who will be able to introduce legislation.

The LORD CHANCELLOR: My lords, I cannot allow this occasion to pass without entering a protest against the precedent set by the noble lord. It is quite within his right, if he thinks proper, to ask Her Majesty's Government whether they mean to alter the law; but to argue a judgment of the Privy Council—a matter over which I may point out, your lordships have no jurisdiction at all —and to use such language as the noble lord has thought it right to use—namely, that the judges have altered the law, and that wrongs have been inflicted by their decision—appears to me neither a decorous treatment of the highest legal tribunal of the land nor a very desirable precedent to set; and, further, it is not calculated, I think, to add to the dignity and impressions which the Judgments of the Privy Council make in those places where observations such as those of the noble lord are likely to do more mischief than good. (Hear, hear.) The noble lord must assume that this is the law, because when once a decision has been given by the highest Court of Appeal it becomes the law of the land. Therefore, the noble lord's course should be to alter the law and not to make observations on the character of a judgment which may do no little harm in the country affected. (Hear, hear.) I want to say this, further, that when the noble lord examines the judgment and comments upon it and reasons with it he is in this difficulty. I am making this protest because I was not a party to this judgment. If I had been I should have refused to have said a word, and I do not suppose that any one of the learned judges sitting in this House who were parties to that judgment would condescend to argue with the noble lord whether their judgment was right or wrong after they had once delivered it. (Hear, hear.) They would tell the noble lord to look at the judgment and read it and—may I add!—understand it—(laughter and cheers)—before he comments upon it.

LORD STANLEY OF ALDERLEY said he understood the noble and learned lord to say that the Privy Council made the law. For that reason it was justifiable to ask that Her Majesty's Government should alter it.

No. 11.—Appendix III to the Memorial; being views of Lord Stanley of Alderley on the Wakf question, as shewn in an article to be found at page 1 of the January number, of the year 1897, of "The Imperial and Asiatic Quarterly Review and Oriental and Colonial Record."

The Privy Council as Judges of Hindoo and Mussulman Law.

Although Hindus and Mussulmans should be the best judges of their own laws and of the advantages which those laws secure to them, yet strictures on the judgments of the Judicial Committee taken from the Indian Press carry less conviction to the minds of English readers than what is written by Englishmen in this country *

The October number of the "Asiatic Quarterly Review" contains several passages by different writers which ought to * * throw light upon what is thought in India the action of the Judicial Committee of the Privy Council in respect of Hindu and Mussulman Law. * *

Page 2.—A Commentary on the Hindu Law has been recently published by Mr. Jogendranath Bhattacharyya, M.A., D.L., of some 760 pages, which appears to be very complete. * * * *

I notice one omission in this book; neither the Preface of the first, nor that of the present second edition mentions whether any copies of it have been subscribed for by the Indian Government for the use of its Courts or public libraries. This omission contrasts badly with the practice of the Government of the East India Company, which encouraged and assisted the publications of the Hedáya, the Mishkát-ul-Musábih, and other similar text-books. This omission seems to corroborate the statement of the Reviewer quoted above of the little care now entertained for Sanskrit or Hindu Law by the Courts or the Privy Council. * * * * * * *

Page 3.—In dealing with the failures of the Judicial Committee to interpret rightly Hindu law, I propose to confine myself to Hindu Wills and succession, and to what is called the Tagore case, because this subject-matter is similar to that of family Wakfs, with respect to which the Judicial Committee, in the opinion of many, misinterpreted Mussulman law. Both Hindu and Mussulman law in this respect tend to the maintenance and perpetuation of families. Heads of families or notables are necessary for the progress and government of a country, and in his recent speech at Oxford, Lord George Hamilton quoted Sir George Clark, who told him that when he went to India as

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Referred to in paragraph 5, page 3, of the Memorial.

a young man the only way to govern the country was by making friends with the notables and governing through their opinions. If anyone should contradict this he would be challenged by the question whether he believed that the Indian Government or any Government in its senses expected to govern by the Tarquinian method of striking down the highest poppies. It is related in the "Gulistan" that Alexander the Great was asked how he succeeded in retaining so many countries that he had conquered: and that he replied: "By respecting their great men."

The difficulty of administering Hindu Law without the assistance of a competent Pundit consists in the fact that Hindu Law is divided into six schools, which are divided into 30 sub-divisions. * * *

Page 9.—With regard to the interpretation of Mussulman law by the Judicial Committee in the matter of family Wakfs, I need not repeat what I said in the House of Lords on that subject, but I will give in disproof of the assertions of the Secretary and Under-Secretary of State for India, that the judgment of the Judicial Committee on that subject was in accordance with Mussulman law, a Resolution which has been sent to me by a Mussulman Association in Bengal:

"*Resolution.*—That the heartfelt thanks of this Association be conveyed to the Rt. Hon. Lord Stanley of Alderley for having in the House of Lords given expression to the views and feelings of the Mussulman Community in India with regard to the recent decision of the Privy Council on the question of Wakf which the Mussulmans consider as inconsistent with the provisions of their Law and Religion and as tending to disturb many of their long-cherished social charitable and religious institutions, and to render insecure the existing titles to large properties throughout India."

I received also a Resolution of thanks from another Association, but I do not quote it as it is not so argumentative as the preceding one.

Family *Wakfs* are usual in all Mussulman countries; but it is to be expected that they should be more common amongst the Indian Mussulmans than in other countries, because such family arrangements are in harmony with the Hindu system of joint ownership and ancestral property. It would be a great mistake to suppose that the antagonism between the Mussulman and Hindu Religions prevents territorial ideas and customs permeating the mass of the inhabitants, and being common to the followers of both religions.

In the judgment of the Judicial Committee against family *Wakfs*, there were two noticeable points—one was disregard of the way in which Mussulman law is interpreted and carried out in other Mussulman countries, such as Constantinople where such *Wakfs* are common.

The other point is contained in the following words of the judgment: "Whether it is to be taken that the very same dispositions which are illegal when made by ordinary words of gift, become legal if only the settler says that they are made as wakfs, in the name of God, or for the sake of the poor. To these questions no answer was given or attempted, nor can their Lordships see any."

These words seem to me to express in judicial language much the same as what was said to me by an Agnostic that Mussulman Law made the Almighty a Trustee. But why not? "God is the best of Protectors," is an invocation very commonly inscribed over Mussulman houses. It was so under the Mosaic Law, which, like the Hindu Shasters, did not allow of the alienation of ancestral property. The Jews were not allowed to buy or sell the fee simple of property; they could only give a lease to the next Jubilee year, which could not be more than a 49-years' lease of it.* For the Lord, speaking to Moses from Mount Sinai (Leviticus xxv. i.) said, v. 23—"The land shall not be sold for ever; for the land is mine; for ye are strangers and sojourners† with me." After this it may be said, reverently, that the Lord was Trustee for the children of Israel.

The Government (Imperial or Indian) cannot say that it has not been duly warned that the study of Mussulman Law has been neglected, and that in consequence that Law has been misinterpreted; for in a Preface to "Personal Law of the Mahommedans" dated Reform Club, December 20, 1880, published by W. H. Allen & Co., Syed Ameer Ali wrote:—

"In India even among educated Moslems, a knowledge of the Mussulman Law, if not actually obsolete, has become extremely rare. Few cultivate it as a science or study it analytically as a branch of comparative law. Those who apply themselves to its study are satisfied with a barren and unprofitable acquaintance with the simple rules of inheritance. This is the consequence of the policy inaugurated by Lord William Bentinck. Prior to his time, the Mussalmans occupied the foremost position among the people of India. The cultivation of their law and their literature was encouraged by successive British governors; their traditions were respected, and they themselves were treated with a certain amount of considertion due to the former rulers of the land. All this changed under Lord William Bentinck's administration, and the Indian Mahommedans were relegated into the cold shade of neglect. Their institutions gradually died out, and the old race of *Moulvys* and *Muftys*, who had shed a lustre on the reigns of the Marquis of Wellesley and the Marquis of Hastings became extinct. Whilst the French in Algeria were endeavouring to give a new impetus to the cultivation of Moslem law and literature by subventions and Government assistance, and whilst they were utilising the indigenous

* P. Phelipe Scio, afterwards Bishop of Segovia; Note to Lev xxv. v. 3.

† P. Phelipe Scio, for 'sojourners' has '*colonos*, tenants or husbandmen.'

institution with the object of improving the condition of their subjects, the British in India allowed the study of every branch of Mahommedan learning to fall into decay. The mischief which has resulted from this mistaken policy can hardly be over-rated. Owing to an imperfect knowledge of Mussulman jurisprudence, of Mussulman manners, customs, and usages, it is not infrequent, even now, to find cases decided by the highest law courts against every principle of the Mahommedan law. It is not surprising, therefore, to learn that every miscarriage of justice adds to the long roll of indictment which the popular mind has framed against the British rule in India. Latterly a desire no doubt has been evinced by some of the local governments—notably by the Governments of Bengal and of Madras—to repair, to some extent, the evils caused by the neglect of half a century. Nothing tangible, however, has yet been achieved towards securing efficient administration of justice in Mahommedan cases."

Less than ten years later, however, the writer of the above was appointed to a seat in the High Court of Calcutta, and it may therefore be hoped that this example will be followed in other judicial appointments.

A Law Court from which there is no appeal, the members of which are irremovable, and which may not be criticised, must necessarily stagnate. When England undertook to administer Hindu and Mussulman law in India, the Courts were assisted by Hindu Pundits and Mussulman Ulemá; even when these were dispensed with, English judges in India were able to consult with such persons, and they were more or less conversant with the manners and customs and institutions of the people of India; but the judges of the Judical Committee have not that assistance, and may lack that sympathy which would shed its light upon law books. There is only one remedy for the evils which Her Majesty's Indian subjects now suffer at the hands of the Privy Council: namely, to put a Hindu and a Mussulman lawyer into the Judicial Committee. * * * * * *

No. 12.—Appendix IV to the Memorial; being quotations from English Text-Writers shewing the reason of the rule against Perpetuities according to the Common Law of England, that reason not being accepted by the Mahomedan Jurists as consonant with their Religion.

THE STATUTE OF USES, while it thus enabled owners to dispose of their lands in methods more suitable to the exigencies of social life, and also materially enlarged the power of alienation itself, opened

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Referred to in paragraph 16, page 9, of the Memorial, and paragraph 3, page 44, of Appendix VIII.

the door at the same time to inconveniences of a different description, and which the policy of the law thought fit to regulate by the rule (called the Rule of Perpetuities) against the creation of too remote limitations; and this rule we shall now proceed to explain. We have already had occasion to refer to the doctrine established by Tultarum's case, in the reign of Edward the Fourth, by which (and in order to aid the free alienation of estates and to keep them in the market) a common recovery was allowed to have the effect of unfettering an estate tail; and it was doubtless in the same spirit when limitations by way of springing and shifting uses, and under powers of revocation and of new appointment, came into practice, that the Courts contemplating with alarm the tendency of these devises to a *perpetuity* thought it necessary to fix some period as the latest at which an estate limited by way of executory use should be allowed to vest; and such a period was accordingly established by a series of judicial decisions, and upon the analogy of the estate tail. We have seen that even under a strict settlement, an estate tail could not, after the doctrine established by Tultarum's case, be preserved from alienation longer than during the life of the taker of the first estate of freehold, and the nonage of the tenant in tail next in remainder; for on attaining the age of twenty-one, the latter was competent with the concurrence of the former to suffer a recovery; and accordingly and by analogy to this, it became the rule that the latest period at which an estate limited by way of executory use could be allowed to vest was (with one particular exception) the exception of some life or lives in being, and twenty-one years afterwards, and that is now the limit of time applicable in such cases. Therefore if a man be seized in fee of lands, and gives them to the first son of J. S. that shall attain the age of twenty-one, and his heirs, here the estate vests, at the latest, on the expiration J. S.'s life and the infancy of such son; and this infancy, generally speaking, cannot expire later than twenty-one years after J. S.'s death; but if the son is born posthumously (which brings the case within the exception above alluded to), it will expire later by the addition of the time of gestation *in utero*, which follows upon such death. Also when the period at which the estate is limited to vest comprises no life or lives in being, it is not allowed to exceed twenty-one years from the time when the limitation is created. And the law (it is said) so much abhors a perpetuity that any limitation either for a legal or for an equitable interest by way of executory use, or otherwise, of such a nature as to lead to the possibility, if it were allowed, of exceeding the limit of time prescribed by the Rule of Perpetuities for the vesting of estates in lands is absolutely void, and the rule applies also to terms

of years and to personal property. And in furtherance of the rule, it has been enacted by the Conveyancing Act 1882 (45 and 46 Vict., C. 39) Sec. 10 with regard to instruments coming into operation on and after the 1st January, 1883, that an executory interest in *lands* to take effect in default of issue or on failure of the issue of the tenant of the executed estate, shall become void as soon as any of such issue attains the age of twenty-one years. *See Stephens' Commentaries on the Laws of England, 12th Ed., Vol. I, page* 514, *published in* 1895.

PERPETUITY.—Another restriction imposed by law on the alienation of property is that the disposition shall not be continued to what is called the rule against perpetuities which prescribes certain limit of time beyond which the acquisition or vesting of the absolute interest in or dominion over the property may not be postponed. The object of the rule is in part the same as that of the prohibition of alienation in Mortmain; namely, to prevent the tying up of property in such a way as to withdraw it from ordinary transferability. If there were no rule against perpetuities "that free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed; the improvement of land checked; its acquisition rendered difficult; the capital of the country gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished." Another reason of it is the possible embarrassment to the State which might result from toleration of the excessive aggrandizment of some one single person or family. Were property allowed to be tied up and wealth to accumulate in any one line, or in any one possessor, the personal influence and power it would attract to itself might have a tendency to disturb, if not altogether to derange, the State itself; for, however, desirable it is to encourage the general growth of wealth in a community, it might, under some circumstances, prove dangerous to allow any particular citizen to be put in that position of elevation above all others which might be the result of an unrestricted accumulation. *See Goodeve's Modern Law of Real Property, 3rd Ed., page* 97, *published in* 1891.

No. 13.—Appendix V to the Memorial; being extracts from a paper contributed by Sir W. Comer Petheram to the "Law Quarterly Review" for April, 1899, page 173, Volume XV, No. 58, entitled "English Judges and Hindoo Law."

In the year 1781, the right of the Hindoo and Mahomedan inhabitants of British India to regulate their lives and properties by their own law was recognised by an Act of the Imperial Parliament, and that right has since been repeatedly affirmed and re-affirmed by Acts of Parliament, Acts of the Indian Legislatures, and the Charters of the High Courts. The Queen's Courts in India and the Judicial Committee of the Privy Council are therefore under the obligation to administer Hindoo Law to Hindoos and Mahomedan Law to Mahomedans, and have done so successfully where they have been able to ascertain what the Hindoo or Mahomedan Law on the subject in question really was. But the difficulty for an English Judge, who knows nothing of Sanskrit, and has had no experience of India, to ascertain what the Hindoo or Mahomedan Law is, must always be very great; and though the works of Hindoo and Mahomedan writers and the industry of Sanskrit and Arabic Scholars, both European and Indian, have in recent years, placed a large amount of information within the reach of students of Eastern Law and Custom, which was not before accessible to them, there is reason to fear that some of the decisions of the Judicial Committee, which are binding on all the Courts in India, are not in accordance with the law by which Hindoos and Mahomedans regulate their lives.

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Page 174.—As has been said before, the joint family is the cherished institution of the Hindoos. It is the institution which has enabled them to exist for ages without either a poor law or public hospitals or charitable institutions; and one of the most curious things in the history of the administration of Eastern Law by European Judges has been the persistent way in which they have attacked this particular institution, in the interest of the money-lenders, *in precisely the same way that they have attacked the Mahomedan families in India, in the interest of the same money-lenders, by refusing to recognise the Mahomedan family settlements, which are known as Wakfs, and by means of which Mahomedans in all countries are accustomed to protect their properties.*

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Referred to in paragraph 14, page 8, paragraph 30 (xx), page 17 of the Memorial.

Page 175.—It may not be quite accurate to say that the Indian Legislature is passing enactment after enactment for the purpose, but it is undoubtedly true that for years the Indian Legislatures and the Judges of the High Courts have been in vain trying to invent some scheme which would give back to the landowners some portion of the protection of which the Judicial Committee has deprived them.

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Page 184.—The outcome of all this is that as far as the Courts of law are concerned, the special distinguishing features of the Mitakshara joint-family system are abolished, and as far as the Courts could destroy it, the system has ceased to exist. *This, as must always be the case when the law of the Courts differs from the law of the people, has caused much misery and ruin, and has also in its own way tended to foster a feeling of distrust and discontent among certain classes.* But this is all that it has been able to do. Notwithstanding the decisions of the Courts, the Mitakshara joint undivided family with all its immemorial usages, customs and laws, continues, and will continue to be the system under which Hindoos, over by far the larger part of India, regulate and will continue to regulate their lives and fortunes. The cause which appears to have been most active in maintaining the differences which exist between the law of the Courts and the laws of the people of India, is the doctrine held by the Judicial Committee that as they are the Final Court of Appeal, they are unable to reconsider their own decisions, but, that whatever may have been the law on any subject, before a decision of theirs was pronounced, after their pronouncement the law is as they have declared it and can only be changed by legislation. This doctrine is no doubt beneficial as regards the House of Lords, as the Law Lords are in touch with the people affected by their decisions; and if they do not commend themselves to the desires of the community affected by them, the law can be changed by Parliament. But the case of the Privy Council in its relation to India is very different. Very few of its members have much knowledge of India and fewer still have ever been much in touch with the Indian peoples, and it would be very difficult to change either the Hindoo or Mahomedan Law as declared by the Privy Council by legislation. The Queen's Courts are under the obligation to administer Hindoo Law to Hindoos and Mahomedan Law to Mahomedans, and any attempt by the legislature to change, what had been declared by the highest tribunal to be Hindoo or Mahomedan Law, unless it were to premise, that the highest tribunal had been misled in some of its declarations as to such law, would look very like an infringement of

the rights of the Indian peoples, which were created by Statute in 1781, and have since been over and over again recognised and confirmed by Acts of Parliament, Acts of the Indian Legislatures, and the Charters of the Courts.

W. C. PETHERAM.

No. 14.—Appendix VI to the the Memorial; being extracts from Sell's "Faith of Islam" on Zakat and Ijtihád.

NOTE TO CHAPTER I.

IJTIHÁD, *page* 32.

QUESTIONS connected with Ijtihád are so important in Islám, that I think it well to give in the form of a note a fuller and more technical account of it than I could do in the Chapter just concluded. This account which I shall now give is that of a learned Musalmán, and is, therefore, of the highest value. It consists of extracts from an article in the Journal Asiatique, Quatriéme Série, tome, 15, on "Le Marche et les Progres de La Jurisprudence parmi les Sectes orthodoxes Musalmanes," by Mirza Kázim Beg, Professor in the University of St. Petersburg.

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"Orthodox Musalmáns admit the following propositions as axioms :—

1. God the only legislator has shown the way of felicity to the people whom He has chosen, and in order to enable them to walk in that way He has shown to them the precepts which are found, partly in the eternal Qurán, and partly in the sayings of the Prophet transmitted to posterity by the companions and preserved in the Sunnat. That way is called the "Sharí'at." The rules thereof are called Ahkám.

2. The Qurán and the Sunnat, which since their manifestation are the primitive sources of the orders of the Law, form two branches of study, *viz.*, Ilm-i-Tafsir, or the interpretation of the Qurán and Ilm-i-Hadís, or the study of Tradition.

3. All the orders of the Law have regard either to the actions (Dín), or to the belief (Imán), of the Mukallifs.*

4. As the Qurán and the Sunnat are the principal sources from whence the precepts of the Shari'at have been drawn, so the rules

* A Mukullif is one who is subject to the Law.

recognised as the principal elements of actual jurisprudence are the subject of Ilm-i-Fiqh, or the science of Law.

Fiqh in its root signifies conception, comprehension. Thus Muhammad prayed for Ibn Mas'úd: "May God make him comprehend (Faqqihahu), and make him know the interpretation of the Qurán." Muhammad in his quality of Judge and chief of the Believers decided, without appeal or contradiction, all the affairs of the people. His sayings served as a guide to the Companions. After the death of the Prophet the first Khalífs acted on the authority of the Traditions. Meanwhile the Qurán and the Sunnat, the principal elements of religion and legislation, became little by little the subject of controversy. It was then that men applied themselves vigorously to the task of learning by heart the Qurán and the Traditions, and then that Jurisprudence became a separate science. No science had yet been systematically taught, and the early Musalmáns did not possess books which would serve for such teaching. A change soon, however, took place. In the year in which the great juris-consult of Syria died (A.H. 80) N'imán bin Sabit, surnamed Abu Hanifa, was born. He is the most celebrated of the founders of the schools of Jurisprudence, a science which ranks first in all Muslim seats of learning. Until that time and for thirty years later the Mufassirs,* the Muhaddis,† and the Fuqihá,‡ had all their knowledge by heart, and those who possessed good memories were highly esteemed. Many of them knew by heart the whole Qurán with the comments made on it by the Prophet and by the Companions; they also knew the Traditions and their explanations, and all the commands (*Ahkám*) which proceed from the Qurán, and the Sunnat. Such men enjoyed the right of Mujtahidín. They transmitted their knowledge to their scholars orally. It was not till towards the middle of the second century A.H. that treatises on the different branches of the Law were written, after which six schools (Mazhabs) of Jurisprudence were formed. The founders, all Imáms of the first class, were Abu Hanífa, the Imám-i-'Azam or great Imám (A.H. 150), Safian As-Sáurí (A.H. 161), Málik (A.H. 179), As-Sháfa'í (A.H. 204), Hanbal (A.H. 241) and Imám Dáúd-az-Zaharí (A.H. 270). The two sects founded by Sáurí and Zaharí became extinct in the eighth century of the Hijra. The other four still remain. These men venerated one another. The younger ones speak with great respect of the elder. Thus Sháfa'í

* Commentators on the Koran.

† The Traditionists.

‡ Plural of Faqih a Theologian.

said:—"No one in the world was so well versed in Jurisprudence as Abu Hanifa was, and he who has read neither his works, nor those of his disciples, knows nothing of Jurisprudence." Hanbal when sick wore a shirt which had belonged to Sháfa'í, in order that he might be cured of his malady. There are three degrees of Ijtihád. *

1. Al-Ijtihád fi'l Shari': absolute independence in legislation.

2. Al-Ijtihád fi'l Mazhab: authority in the judicial systems founded by the Mujtahidín of the first class.

3. Al-Ijtihád fi'l Masáil: authority in cases which have not been decided by the authors of the four systems of Jurisprudence.

The first is called a complete and absolute authority, the second relative, the third special.

THE FIRST DEGREE OF IJTIHÁD.

Absolute independence in legislation is the gift of God. He to whom it is given when seeking to discover the meaning of the Divine Law is not bound to follow any other teacher. He can use his own judgment. This gift was bestowed on the juris-consults of the first, and to some in the second and third centuries. The Companions, however, who were closely connected with the Prophet, having transmitted immediately to their posterity the treasures of legislation, are looked upon as Mujtahidín of much higher authority than those of the second and third centuries. Thus Abu Hanífa says:—"That which comes to us from the Companions is on our head and eyes (*i.e.*, to be received with respect): as to that which comes from the Tábi'ín, they are men and we are men." *

Since the time of the Tábi'ín this degree of Ijtihád has only been conferred on the six great Imáms. Theoretically any Muslim can attain to this degree, but it is one of the principles of Jurisprudence that the confirmation of this rank is dependent on many conditions, and so no one now gains the honour. These conditions are:—

1. The knowledge of the Qurán and all that is related to it; that is to say, a complete knowledge of Arabic literature, a profound acquaintance with the orders of the Qurán and all their sub-divisions, their relationship to each other and their connection with the orders of the Sunnat. The candidate should know when and why each verse of the Qurán was written, he should have a perfect aquaintance with the literal meaning of the words, the speciality or generality of each

* Referred to in paragraph 17, page 10, and paragraph 29, page 14 of the Memorial; also referred to in paragraph 10, page 46 of Appendix VIII, and paragraph 35, page 52 of the said Appendix.

clause, the abrogating and abrogated sentences. He should be able to make clear the meaning of the 'obscure' passages (*Mutashábih*), to discriminate between the literal and the allegorical, the universal and the particular.

2. He must know the Qurán by heart with all the Traditions and explanations.

3. He must have a perfect knowledge of the Traditions, or at least of three thousand of them.

He must know their source, history, object and their connection with the laws of the Qurán. He should know by heart the most important Traditions.

4. A pious and austere life.

5. A profound knowledge of all the sciences of the Law.

Should anyone *now* aspire to such a degree another condition would be added, *viz* :—

6. A complete knowledge of the four schools of Jurisprudence.

The obstacles, then, are almost insurmountable. On the one hand, there is the severity of the 'Ulamá, which requires from the candidates things almost impossible; on the other, there is the attachment of the 'Ulamá to their own Imáms, for should such a man arise no one is bound now to listen to him. Imám Hanbal said:—"Draw your knowledge from whence the Imáms drew theirs, and do not content yourself with following others for that is certainly blindness of sight." Thus the schools of the four Imáms remain intact after a thousand years have passed, and so the 'Ulamá recognise since the time of these Imáms no Mujtahid of the first degree. Ibn Hanbal was the last.

The rights of the man who attained to this degree were very important. He was not bound to be a disciple of another: he was a mediator between the Law and his followers, for whom he established a system of legislation, without anyone having the right to make any objection. He had the right to explain the Qurán, the Sunnat and the Ijmá' according as he understood them. He used the Prophet's words, whilst his disciples only used his. Should a disciple find some discrepancy between a decision of his own Imám and the Qurán or Traditions, he must abide by the decision of the Imám. The Law does not permit him to interpret after his own fashion. When once the disciple has entered the sect of one Imám he cannot leave it and join another. He loses the right of private judgment, for only a Mujtahid of the first class can dispute the decision of one of the Imáms. Theoretically such Mujtahidín may still arise; but, as we have already shown, practically they do not.

THE SECOND DEGREE OF IJTIHÁD.

This degree has been granted to the immediate disciples of the great Imáms who have elaborated the systems of their masters. They enjoyed the special consideration of the contemporary 'Ulamá, and of their respective Imáms who in some cases have allowed them to retain their own opinion. The most famous of these men are the two disciples of Abu Hanífa, Abu Yúsuf and Muhammad bin al Hasan. In a secondary matter their opinion carries great weight. It is laid down as a rule that a Muftí may follow the unanimous opinion of these two even when it goes against that of Abu Hanífa.

THE THIRD DEGREE OF IJTIHÁD.

This is the degree of special independence. The candidates for it should have a perfect knowledge of all the branches of Jurisprudence according to the four schools of the Arabic language and literature. They can solve cases which come before them, giving reasons for their judgment, or decide on cases which has not been settled by previous Mujtahidín; but in either case their decisions must always be in absolute accordance with the opinions of the Mujtahidín of the first and second classes, and with the principles which guided them. Many of these men attained great celebrity during their lifetime, but to most of them this rank is not accorded till after their death. Since Imám Qází Khán died (A.H. 592), no one has been recognised by the Sunnís as a Mujtahid even of the third class.

There are three other inferior classes of jurists, called Muqallidín or followers of the Mujtahidín; but all that the highest in rank amongst them can do is to explain obscure passages in the writings of the older juris-consults. By some of the 'Ulamá they are considered to be equal to the Mujtahidín of the third class. If there are several conflicting legal opinions on any point, they can select one opinion on which to base their decision. This a mere Qázi cannot do. In such a case he would have to refer to these men, or to their writings for guidance. They seem to have written commentaries on the legal systems without originating anything new. The author of the Hidáyah, who lived at the end of the sixth century, was a Muqalid.

Such is Mirza Kázim Beg's account. The whole article, of which I have only given the main points, is worthy of the closest study.*

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* Osborn's "Islam under the Khalifs," p. 72.

CHAPTER II.

Page 37.—EXEGESIS OF THE QURÁN AND THE TRADITIONS.

THE following account of this branch of Muslim theology, technically called 'Ilm-i-Usúl, may be introduced by a few remarks on the nature of inspiration according to Islám, though that is not strictly speaking a portion of this study.

There are two terms used to express different degrees of inspiration, Wahí and Ilhám. Wahí is the term applied to the inspiration of the Qurán, and implies that the very words are the words of God.

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Ilhám means the inspiration given to a saint or to a prophet when he, though rightly guided, delivers the subject-matter out of his own mind. * * * * *

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Page 45. The question of the interpretation of the text speedily became a very important branch of the "'Ilm-i-usúl." *

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To the Prophet alone was the solution known. The knowledge he communicated to his immediate followers, the Companions, as they are called, thus: "To thee have we sent down this book of monitions, that *thou mayest make clear to men* what hath been sent down to them." (Súra xvi. 46).

Ibn Khaldoun says: "The Prophet unfolded the meaning distinguished between abrogated and abrogating verses, and communicated this knowledge to his Companions. It was from his mouth that they knew the meaning of the verses and the circumstances which led to each distinct revelation being made." The Companions thus instructed became perfectly familiar with the whole revelation. This knowledge they handed down by word of mouth to their followers, the Tábe'in, who in their turn passed it on to their followers the

Taba-i-Tába'ín. The art of writing then became common, and the business of the commentator henceforth was to collect together the sayings of the Companions thus handed down. Criticism of a passage in the Qurán was not his duty, criticism of a comment made on it by a Companion was beyond his province: the first was too sacred to be touched, the second must be accepted if only the chain of narrators of the statement were perfect. Thus early in the history of Islám were the principles of exegesis fixed and settled. Every word, every sentence, has now its place and class. The commentator has now only to reproduce what was written before, though he may in elucidation of the point, bring forth some Tradition hitherto unnoticed which would, however, be a difficult thing to do.

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The technical terms which the student must know, and the definitions of which he must understand, are those which relate to the nature of the words, the sentences, the use of the words of the Qurán, and the deduction of arguments from passages in the book.

I. The words of the Qurán, are divided into four classes:—

1. *Khass*, or special words. These are sub-divided into three classes. First, words which relate to genus, *e.g.*, mankind. Secondly, words which relate to species, *e.g.*, a man, which refers to men as distinguished from women. Thirdly, words which relate to special individuality, *e.g.*, Zeid, which is the name of a special individual.

2. *'Amm*, or common or collective names, such as "people."

3. *Mushtarik*, or words which have several significations, as the Arabic word "'ain," which may mean an eye, a fountain, or the sun. Again, the word "Sulát," if connected with God, may mean mercy, as "Sulát Ulláh," the mercy of God; if with man, it may mean either "namáz," a stated liturgical service, or "du'a," prayer in its ordinary sense, *e.g.*, Sulát-ul-Istisqá (prayer in time of drought) is du'a, not namáz.

4. *Muawwal*, words which have several significations all of which are possible, and so a special explanation is required. For example, Súra cviii. 2 reads thus in Sale's translation: "Wherefore pray unto the Lord and *slay* (the victims)." The word translated "slay" is in Arabic "nahr," which has many meanings. The followers of the great Legist Abu Hanífa render it "sacrifice," and add the words (the "victims"). The followers of Ibn Sháfa'í say it means "placing the hands on the breast in prayer."

This illustrates the difference between Mushtarik and Muawwal. In the former, only one meaning is allowable, and that meaning the context settles; in the latter both meanings are allowable and both right.

These divisions of words having been well mastered and the power of defining any word in the Qurán gained, the student passes on to consider the nature of the sentences. These are divided into two great classes,—the "Obvious," and the "Hidden."

This division is referred to in the following passage of the Qurán. "He it is who hath sent down to thee the book. Some of its signs are of themselves *perspicuous;* these are the basis (literally "mother") of the book, and others are *figurative.* But they whose hearts are given to err follow its figures, craving discord, craving an interpretation; yet none know its interpretation, but God. And the stable in knowledge say: 'We believe in it, it is all from God.'" (Súra iii. 3).

This has given rise to the division of the whole book into literal and allegorical statements. In order to explain these correctly the commentator must know (1) the reason why, (2) the place where, (3) the time when the particular passage he is expounding was revealed; he must know whether it abrogates or is abrogated, whether it is in its proper order and place or not; whether it contains its meaning within itself or needs the light which the context throws upon it; he must know all the Traditions which bear upon it, and the authority for each such Tradition. This effectually confines the order of commentators in the strict sense of the word to the Companions, and supplies the reason why commentators since then simply reproduce their opinions. But to return from this digression. Sentences are Záhir—"Obvious," or Khafí—"Hidden." Obvious sentences are divided into four classes.

I. (1) *Záhir*, or obvious, the meaning of which is so clear that he who hears it at once understands its meaning without seeking for any explanation. This kind of sentence may be abrogated. Unless abrogated, action in accordance with it is to be considered as the express command of God. All penal laws and the rules regulating the substitution of one religious act for another, *e.g.*, almsgiving instead of fasting, must be based on this, the clearest of the obvious sentences.

(2) *Nass*, a word commonly used for a text of the Qurán, but in its technical meaning here expressing what is meant by a sentence, the meaning of which is made clear by some word which occurs in it. The following sentence illustrates both Záhir and Nass: "Take in marriage of such other women as please you, two, three, four."

This sentence is Záhir, because marriage is here declared lawful; it is Nass, because the words "one, two, three, four," which occur in the sentence, show the unlawfulness of having more than four wives.

(3) *Mufassir*, or explained. This is a sentence which needs some word in it to explain it and make it clear. Thus: "And the angels prostrated themselves, all of them with one accord, save Iblis (Satan)." Here the words "save Iblis," show that he did not prostrate himself. This kind of sentence may be abrogated.

(4) *Mukham*, or perspicuous. This is a sentence as to the meaning of which there can be no doubt, and which cannot be controverted, thus: "God knoweth all things." This kind of sentence cannot be abrogated. To act on such sentences without departing from the literal sense is the highest degree of obedience to God's command.

The difference between these sentences is seen when there is a real or apparent contradiction between them. If such should occur, the first must give place to the second, and so on. Thus Mukham cannot be abrogated or changed by any of the preceding, or Mufassir by Nass, &c.

The other great division of sentences is that of

II. (1) *Khafi*, or hidden. Such are those sentences in which other persons or things are hidden beneath the plain meaning of a word or expression contained therein, as: "as for a thief, whether male or female, cut ye off their hands in recompense for their doings." (Súra v. 42). The word for thief is "*Sáriq*," and in this passage it is understood to include highwaymen, pickpockets, plunderers of the dead, &c. These meanings are Khafí or hidden under it.

(2) *Muskhil* or ambiguous. The following is given as an illustration: "And (their attendants) shall go round about them with vessels of silver and goblets. The bottles shall be bottles of silver." The difficulty here is that bottles are not made of silver, but of glass. The commentators say, however, that glass is dull in colour, though it has some lustre, whilst silver is white, and not so bright as glass. Now it may be, that the bottles of Paradise will be like glass bottles as regards their lustre, and like silver as regards their colour. But anyhow, it is very difficult to ascertain the meaning.

(3) *Mujmal*. These are, first, sentences whichmay have a variety of interpretations, owing to the words in them being capable of several meanings; in that case the meaning which is given to the sentence in the Traditions relating to it should be acted on and accepted. Secondly, the sentence may contain some very rare word, and thus its meaning may be doubtful, as: "Man

truly is by creation hasty" (Súra lxx. 19). In this verse the word "halú'"—hasty—occurs. It is very rarely used, and had it not been for the following words, "when evil toucheth him, he is full of complaint; but when good befalleth him, he becometh niggardly," its meaning would not have been at all easy to understand.

The following is an illustration of the first kind of *Mujmal* sentences: "Stand for prayer(*salát*) and give alms" (*zakát*). Both *salát* and *zakát* are 'Mushtarik' words. The people, therefore, did not understand this verse, so they applied to Muhammad for an explanation. He explained to them that "salát" might mean the ritual of public prayer, standing to say the words "God is great," or standing to repeat a few verses of the Qurán; or it might mean private prayer. The primitive meaning of "zakát" is growing. The Prophet, however, fixed the meaning here to that of "almsgiving," and said, "Give of your substance one-fortieth part."

(4) *Mutashdbih.*—These are sentences so difficult that men cannot understand them, a fact referred to in Súra iii. 3, nor will they do so until the day of resurrection. The Prophet, however, knew their meaning. Such portions are the letters A, L, M; A, L, R; Y, A at the commencement of some of the Súras. Such expressions also as "God's hand," "The face of God," "God sitteth," &c., come under this category.

The next point to be considered is the *use* of words in the Quran, and here again the same symmetrical division into four classes is found, *viz:*—

(1) *Haqíqat*, that is, words which are used in their literal meaning as "rukú," a prostration, and "salát" in the sense of prayer.

(2) *Majáz*, or words which are used in a figurative sense, as "salát" in the sense of "námáz" a liturgical service.

(3) *Sarih*, or words the meaning of which is quite evident, as "Thou art *divorced*," "Thou art *free*."

(4) *Kinayáh*, or words which, being used in a metaphorical sense, require the aid of the context to make their meaning clear, as: "Thou art separated," which may, as it stands alone, mean "Thou art divorced." This class also includes all pronouns the meaning of which is only to be known from the context, *e.g.*, one day the Prophet not knowing who knocked at his door said, "Who art thou?" The man replied, "It is I." Muhammad answered, "Why dost thou say I, I? Say thy name that I may know who thou art." The pronoun "I" is here 'kinayáh.'

The most important and most difficult branch of exegesis is

"istidlál," or the science of deducing arguments from the Qurán. This too is divided into four sections, as follows:—

(1) *Ibárat*, or the plain sentence. "Mothers, after they are divorced, shall give suck unto their children two full years, and the father shall be obliged to maintain them and clothe them according to that which is reasonable" (Súra ii, 233). From this verse two deductions are made. First, from the fact that the word "them" is in the feminine plural, it must refer to the mothers and not to the children; secondly, as the duty of supporting the mother is incumbent on the father, it shows that the relationship of the child is closer with the father than with the mother. Penal laws may be based on a deduction of this kind.

(2) *Ishárat*, that is, a sign or hint which may be given from the order in which the words are placed.

(3) *Dalálat*, or the argument which may be deduced from the use of some special word in the verse, as: "Say not to your parents,' "Fie" (Arabic "uff"), (Súra xvii. 23). From the use of the word "uff," it is argued that children may not beat or abuse their parents. Penal laws may be based on "dalálat," thus: "Their aim will be to abet disorder on the earth: but God loveth not the abettors of disorder" (Súra v. 69). The word translated "aim" is in Arabic literally yasa'úna, "they run." From this the argument is deduced that as highwaymen wander about, they are included amongst those whom "God loveth not," and that, therefore, the severest punishment may be given to them, for any deduction that comes under the head of "dalálat" is a sufficient basis for the formation of the severest penal laws.

(4) *Iqtizá*.—This is a deduction which demands certain conditions: "whosoever killeth a believer by mischance, shall be bound to free a believer from slavery" (Súra iv. 94). As man has no authority to free his neighbour's slave, the condition here required, though not expressed, is that the slave should be his own property.

The Qurán is divided into:—

(1) *Harf* (plural *Hurúf*), letters.—The numbers given by different authorities vary. In one standard book it is said that there are 338,606 letters.

(2) *Kalima* (plural *Kalimát*), words, stated by some to amount 79,087; by others to 77,934.

(3) *Áyat* (plural *Áyát*) verses.—Ayat really means a sign, and was the name given by Muhammad to short sections or verses of the Qurán. The end of a verse is determined by the position of a small circle O. The early Qurán Readers did not agree as to the position of these circles, and so five different ways of arranging them have arisen.

This accounts for a variation in the number of verses in various editions. The varieties are:—

(1) *Kufa* verses.—The Readers in the city of Kúfa say that they followed the custom of Ali. Their way of reckoning is generally adopted in India. They reckon 6,239 verses.

(2) *Basra* verses.—The Readers of Basra follow 'Asim bin Hajjáj, a Companion. They reckon 6,204.

(3) *Shámi* verses.—The Readers in Syria (Shám) followed Abd-ulláh bin 'Umr, a Companion. They reckon 6,225 verses.

(4) *Mecca* verses.—According to this arrangement there are 6,219 verses.

(5) *Madina* verses.—This way of reading contains 6,211 verses.

In each of the above varieties the verse "Bismillah" (in the name of God) is not reckoned. It occurs 113 times in the Qurán.

This diversity of punctuation does not generally affect the meaning of any important passage. The third verse of the third Súra is an important exception. The position of the circle O, the symbol denoting a full stop, in that verse is of the highest importance in connection with the rise of scholasticism (*'Ilm-i-kalam*) in Islam.

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(4) *Súra*, or chapter.—The word Súra means a row or series, such as a line of bricks arranged in a wall, but it is now exclusively used for chapters in the Qurán. These are one hundred and fourteen in number. The Súras are not numbered in the original Arabic, but each one has some approximate name (as Baqr—the cow, Nisá—women, &c.), generally taken from some expression which occurs in it. They are not arranged in chronological order, but according to their length. As a general rule, the shorter Súras, which contain the theology of Islám, belong to the Meccan period of the Prophet's career, and the longer ones relating chiefly to social duties and relationships, to the organisation of Islám as a civil polity, to the time when he was consolidating his power at Madína. The best way, therefore, to read the Qurán is to begin at the end. The attempt to arrange the Súras in due order is a very difficult one, and, after all, can only be approximately correct. Carlyle, referring to the confused mass of "endless iterations, long-windedness, entanglement, most crude, incondite" says: "nothing but a sense of duty could carry any European through the Qurán." When re-arranged the book becomes more intelligible. The chief tests for such re-arrangement are the style and the matter. There is a very distinct difference in both of these respects between the earlier and later Súras. The references

to historical events sometimes give a clue. Individual Súras are often very composite in their character, but, such as they are, they have been from the beginning. The recension made by Zeid, in the reign of the Khalíf Osmán, has been handed down unaltered in its form. The only variations (*qirá'at*) now to be found in the text have been already noticed. They in no way affect the arrangements of the Súras.

(5) *Sípára*, a thirtieth portion.—This is a Persian word derived from *sí*, thirty and *pára*, a portion. The Arabs call each of these divisions a *Juz*. Owing to this division, a pious man can recite the whole Qurán in a month, taking one Sípára each day. Musalmáns never quote the Qurán as we do by Súra and Ayat, but by the Sípára and Rukú,' a term I now proceed to explain.

(6) *Rukú* (plural *Rukúát*).—This word literally means a prostration made by a worshipper in the act of saying the prayers. The collection of verses recited from the Qurán ascriptions of praise offered to God, and various ritual acts connected with these, constitute one act of worship called a "rak'at." After reciting some verses in this form of prayer, the worshipper makes a *Rukú'*, or prostration, the portion then recited takes the name of *Rukú'*. Tradition states that the Khalíf Osmán, when reciting the Qurán during the month of Rámazán, used to make twenty rak'ats each evening In each rak'at he introduced different verses of the Qurán, beginning with the first chapter and going steadily on. In this way he recited about two hundred verses each evening; that is, about ten verses in each rak'at. Since then, it has been the custom to recite the Qurán in this way in Ramazán, and also to quote it by the rukú', *e.g.*, "such a passage is in such a Sípára and in such a Rukú." * * * * * * *

Page 58. (7) The other divisions are not important. They are, a *Sumn*, *Ruba'*, *Nisf*, *Suls* that is one-eight, one-fourth, one-half one-third of a Sípara respectively. * * * * * *

Page 58. The doctrine of abrogation is a very important one in connection with the study of the Qurán. It is referred to in the verses: "Whatever verses we cancel or cause thee to forget, we give thee better in their stead, or the like thereof" (Súra ii. 100). This is a Madina Súra. "What He pleaseth will God abrogate or confirm; for with Him is the source of revelation" (Súra xiii. 39). Some verses which were cancelled in the Prophet's lifetime are now extant. Abdullah Ibn Masúd states that the Prophet one day recited a verse which he immediately wrote down. The next morning he found it had vanished from the material on which it had been written. Astonished at this, he acquainted Muhammad with the fact, and was informed that the verse in question had been revoked. There are, however, many

verses still in the Qurán, which have been abrogated. * * * * * * * * * * * * * * Certain rules have been laid down to regulate the practice. The verse which abrogates is called *Nasikh*, and the abrogated verse *Mansukh*. *Mansukh* verses are of three kinds:—first, where the words and the sense have both been abrogated; secondly, where the letter only is abrogated and the sense remains; thirdly, where the sense is abrogated though the letter remains. Imám Málik gives as an instance of the first kind the verse: "If a son of Adam had two rivers of gold, he would covet yet a third; and if he had three he would covet yet a fourth. Neither shall the belly of a son of Adam be filled, but with dust. God will turn unto him who shall repent." The Imán states that originally this verse was in Súra (ix.) called Repentance. The verse, called the "verse of stoning," is an illustration of the second kind. It reads: "Abhor not your parents for this would be ingratitude in you. If a man and woman of reputation commit adultery, ye shall stone them both; it is a punishment ordained by God; for God is mighty and wise." The Khalíf Omar says this verse was extant in Muhammad's lifetime but that it is now lost. But it is the third class which practically comes into 'Ilm-i-usúl. Authorities differ as to the number of verses abrogated. Sale states that they have been estimated at two hundred and twenty-five. The principal ones are not many in number, and are very generally agreed upon.

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or offerings on the feast day known as 'Íd-ul-Fitr, or alms in general.* It is the first of these that has now to be considered.

On the authority of the Qurán and the Ijmá-i-Ummat it is declared to be a farz duty for every Muslim of full age, after the expiration of a year, to give the Zakát on account of his property; provided that he has sufficient for his subsistence and is a Sáhib-Nisáb, or one who possesses an income equivalent to about £5 per annum. The Qurán says: "Observe prayer (*Salát*) and the legal impost (*Zakát*)." (Súra

* "The former are called Zakát, either because they increase a man's store by drawing down a blessing on him and produce in his soul the virtue of liberality, or because they purify the remaining part of one's substance from pollution and the soul from the filth of avarice; the latter are called Sadqa because they are a proof of a man's sincerity in the worship of God." Sale's Preliminary Discourse, Section iv.

ii. 40.) The Khalíf 'Umr Ibn 'Abd-ul-Aziz used to say: "Prayer carries us half-way to God, fasting brings us to the door of His palace, and alms procure us admission." The three conditions without which Zakát would not be compulsory are Islám, Húrriat (freedom) and Nisáb (stock). The reason for this is, that Zakát is said to be a fundamental part of 'Ibádat (worship) and that, as the Infidels cannot perform acceptable worship, they have nothing to do with Zakát. Freedom is necessary, for slaves hold no property. Nisáb is required, for so the Prophet has decreed. When the Nisáb is required for daily use the Zakát is not taken from it; such as a slave retained for personal service, grain for food, weapons, tools, books, household furniture, wearing apparel, horses for riding, &c., for one Tradition records that the Prophet specially exempted all these, whilst another given on the authority of Bukhári states that for slaves employed in domestic service only the Sadqa-i-fitr * should be given. If a person owes a debt, the amount necessary for its liquidation must be deducted from his property and the Zakát given on the balance. If it is a debt due to God, such as an offering due on a vow or to be given in atonement for the neglect of some religious duty, it must not be so deducted from the property on which Zakát is due.

The amount of gold which constitutes a Nasáb is 20 miskats, or silver 200 dirhems (=£5 4s.). Whether these metals are in coin or not, one-fortieth part is due. Some say that gold and silver ornaments are exempt, but Imám Sháfa'i does not admit this, and quotes from Abu Dáúd the following Tradition: "A woman with a child, on whose arms were heavy golden bracelets, came to the Prophet. He enquired if the Zakát had been given for them. On receiving a reply in the negative he said: 'It is easy for God in the day of judgment to make thee wear bracelets or fire.' The girl then took them off and said: 'These are for the service of God and of His Prophet.'" On all treasure known as rikáz, that is, buried treasure found by anyone, and on valuable metals extracted from mines, one-fifth of the value must be paid, whether the land be Khárijí, rented at its proper market value; or 'Usharí possessed by the payment of a tithe. If the rikáz is found in Dar-ul-Harb, a country under a non-Muslim Government, the whole belongs to the finder, if it is on his own land, or if on unclaimed land he must pay the one-fifth. If the coins found bear the mint stamp of a Musalmán Government, the finder must, if he can, find the owner and return them to him; if they were coined in a mint belonging to the Infidels, after having given one-fifth as Zakát, he many retain four-fifths for himself.

* That is food or money sufficient to provide one meal for a poor person.

Pearls, amber and turquoise are not subject to any deduction, for the prophet said: "There is no Zakát for stones."

As regards cattle the following rules have been laid down: For sheep and goats nothing is given when the number is under forty. The owner must give one for one hundred and twenty, two for the next eighty, and one for every hundred after. The scale for buffaloes is the same as that for sheep.

For camels the rule is as follows: from 5 to 24 in number, one sheep or goat must be given; from 25 to 35, one yearling female camel (*bint-i-mukhád*); from 36 to 45, one two-year old female camel (*bint-i-labún*); from 46 to 60, one three-year old female camel (*hiqqah*); from 61 to 75, one four-year old female camel (*jaz'ah*); from 76 to 90, two bint-i-labun; from 91 to 120, two hiqquah; and from 121 upwards, either a bint-i-labún for every forty or a hiqquah for every fifty. Horses follow this scale, or two-and-a-half per cent. on the value may be given instead. For 30 cows a one-year old female calf (*tabí'a*) must be given; for 40, a two-year old female calf (*musinna*), and after that one calf for every ten cows.

Donkeys and mules are exempt, for the Prophet said: "No order has come down (from heaven) to me about them."

If a stock of merchandize exceeds the Nisáb (£5 4*s*.), Zakát must be given on it and on the profits at the rate of one in forty, or two-and-a-half per cent. The Hanífites do not count a fraction of the forty. The Sháfá'ites count such a fractional part as forty and require the full Zakát to be paid on it.

Honey, fruit, grain, &c., although less than five camel loads,* must according to Imám Abu Hanífa pay one-tenth; but the Sáhibain and Imám Sháfa'i say that if there is less than the five camel loads no Zakát is required. The Prophet said: "If produced on land naturally watered one-tenth is due, from land artificially irrigated one-twentieth." As he said nothing about the quantity, the Hanífites adduce the fact of the omission as a proof on their side.

The Zakát should be given to the classes of person mentioned in the following verse: "Alms are to be given to the poor and the needy, and to those who collect them, *and to those whose hearts are won to Islám*, and for ransoms, and for debtors, and for the cause of God, and for the wayfarer" (Súra ix. 60). The words italicised according to the Tafsír-i-Husainí, are now cancelled (*Mansúkh*). The reference is to the Arab Chiefs who were beaten by the Prophet at the battle of Honein (A.H. 8). This victory is referred to in the 25th verse of this Súra.

* The technical term is 5 wasq. A wasq is equal to 60 sá,' and asá' is equal to 8 ratal. A ratal is equal to 1 lb; so a wasq, a load for one camel, is about 480 lb.

"God hath helped you in many battle-fields, and on the day of Honein." Abu Bakr abolished this giving of Zakát to converts, and the Khalif Omar said to these or similar persons: "This Zakát was given to incline your hearts toward Islám. Now God has prospered Islám. If you be converted it is well; if not, a sword is between us." No Companion has denied this statement, and so the authority for the cancelling of this clause is that of the Ijmá'-i Ummat (unanimous consent). It is well that an appeal to unworthy motives should be abolished, but no commentator so far as I know makes that a reason for the cancelling of this order. It is always placed on the ground of the triumphant nature of Islám which now needs no such support. Contemptuous indifference, not any high moral motive, was the cause of the change.

In addition to the persons mentioned in the verse just quoted, Zakát may be given to assist a Mukátib, or slave who is working in order to purchase his freedom. Persons who are too poor to go on a Jihád or to make the Hajj must be assisted.

The Zakát must not be given for building mosques,* for funeral expenses, liquidating the debts of a deceased person, or to purchase a slave in order to set him free. It is not lawful to give the Zakát to parents or grand-parents, children or grandchildren; or for a husband to give it to his wife, or a wife to her husband; or a master to his slave. The Sáhibain† maintain that a wife can apply the Zakát to her husband's wants, and quote this Tradition: "A woman asked the Prophet if she could give the Zakát to her husband. He answered 'give; such an act has two rewards, one for the giving of charity and one for the fulfilment of the duties of relationship.'" It should not be given to a rich man, nor to his son, nor to his slave. The descendants of Hásham and the descendants of the Prophet should not be the recipients of the Zakát. The Prophet said: "O Ahl-i-Biet (men of the house), it is not lawful for you to receive Zakát, for you get the one-fifth share of my fifth portion of the booty." So some say that Syeds are excluded; but they demur and reply that they do not now get a portion of the spoil of the Infidels. Zakát must not be given to a Zimmí (a non-Muslim subject).

In Muhammadan countries there are officers whose duty it is to collect the Zakát; in India the payment is left to each person's conscience. Whilst there is not much regularity in the payment, due credit must be given for the care which Musalmáns take of their poor.

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* Mosques are usually endowed. The property thus set apart is called Wakf. This supports the various officials connected with a Mosque.

† The two famous disciples of Imám Abu Hanífa, Abu Yúsuf and Muhammad.

The Sadqa (charitable offerings) form a different branch of this subject. A full account of it will be given in the section of the next chapter which treats of the 'Id-ul-Fitr.

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CHAPTER VI., *page* 237.

THE FEASTS AND FASTS OF ISLAM.

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Page 250. When the thirty days have passed the fast is broken. This act is called Iftár, and the first day on which food is taken is called the 'Id-ul-Fitr—the 'Feast of the breaking of the fast.' On that day the Sadqa or alms are given before the Namàz is said in the Mosque. The Sadqa of the 'Id-ul-Fitr is confined to Muslims: no other persons receive it. If anyone neglects to give these alms before the Namaz is said, he will not merit so great a reward as he otherwise would. The reason assigned for this is that, unless they are given early in the day, the poor cannot refresh themselves before coming to the Mosque for the Namáz. The Sadqa are given for the good of one's own soul, for that of young children, slaves, male and female—Muslim or Infidel; but not for the spiritual benefit of one's wife or elder children.

In South India, the Sadqa consists of a gift of sufficient rice to feed one person. When this has been done the people go to the Mosque saying, 'God is great! God is great!' The Namáz is like that of a Friday, except that only two rak'ats are said, and the Khutba which is said after the Namáz is sunat; whereas the Friday Khutba is said before the farz rak'ats, and is itself of farz obligation. After hearing the sermon, the people disperse, visit each other and thoroughly enjoy themselves.

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Page 65.—The next subject for consideration is that of the Traditions, or the second branch of the science of 'Ilm-i-usúl. The Traditions contain the record of all that Muhammad did and said. It is the belief of every Muslim, to whatever sect he belongs, that the

Prophet not only spoke but also acted under a divine influence. The mode of the inspiration is different from that of the Qurán. There the revelation was objective. In the Prophet's sayings recorded in the Traditions, the inspiration is subjective, but still a true inspiration. This belief places the Traditions in a place second only to the Qurán; it makes them a true supplement to that book, and thus they not only throw light on its meaning, but themselves form the basis on which doctrines may be established. Without going so far as to say that every Tradition by itself is to be accepted as an authority in Islám, it may be distinctly asserted that there can be no true conception formed of that system if the Traditions are not studied and taken into account. So important a branch of Muslim theology it is, that the study of the Traditions is included in the 'Ilm-i-usúl, or science of exegesis. Some account of them, therefore, naturally forms part of this chapter.

The first four Khalifs were called the Khulafá-i-Ráshidín, that is, those who could guide others aright. They had been friends and companions of the Prophet, and the Faithful could always appeal to them in cases of doubt. The Prophet had declared that Islám must be written in the hearts of men. There was therefore an unwillingness to commit his sayings to writing. They were handed down by word of mouth. As no argument was so effectual in a dispute as "a saying" of the Prophet, the door was opened by which spurious Traditions could be palmed off on the Faithful. To prevent this, a number of strict rules were framed, at the head of which stands the Prophet's saying, itself a Tradition: "Convey to other persons none of my words except those which ye know of a surety. Verily, he who purposely represents my words wrongly will find a place for himself nowhere but in fire." To enforce this rule, it was laid down that the relator of a Tradition must also repeat its "Isnád," or chain of authorities, as: "I heard from such a one, who heard from such a one," and so on, until the chain reaches the Prophet himself. Each person, too, in this "Isnád," must have been well known for his good character and retentive memory. This failed, however, to prevent a vast number of manifestly false Traditions becoming current; so men set themselves to the work of collecting and sifting the great mass of Traditions that in the second century of Islám had begun to work untold evil. These men are called "Muhadisín," or "collectors of Tradition." The Sunnís and the Wahhábís recognise six such men, and their collections are known as the "Sihah-Sittah," or six correct books. They are the following:—

(1) The *Sahíh-i-Bukdhrí*, called after Abu Abdullah Muhammad Ibn-i-Ismá'íl, a native of Bukhárá. * * * * * *

Page 68. (2) *Sahíh-i-Muslim.*—Muslim Ibn-i-Hajjáj was born at Nisháp'r, a city of Khorásán. He collected about 300,000 Traditions, from which he made his collection. * * * * *

Page 68. (3) *Sunan-i-Abu-Dáúd.*—Abu Dáúd Sajistání, a native of Seistán, was born A.H. 202. He collected about 500,000 Traditions, of which he selected four thousand eight hundred for his book.

(4) *Jámi'-i-Tirmizí.*—Abu Isa' Muhammad Tirmizi was born at Tirmiz in the year A.H. 209. He was a disciple of Bukhárí. Ibn Khallikan says this work is "the production of a well-informed man: its exactness is proverbial."

(5) *Sunan-i-Nasáí.*—Abu Abd-ur-Rahman Nasáí was born at Nasá, in Khorásán, in the year A.H. 214, and died A.H. 303. It is recorded of him, with great approbation, that he fasted every other day, and had four wives and many slaves. This book is considered of great value.

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Page 69. (6) *Sunan-i-Ibn Májah.*—Ibn Májah was born at Irak A.H. 209. This work contains 4,000 Traditions.

The Shía'hs reject these books and substitute five books * of their own instead. They are of a much later date, the last one, indeed, having been compiled more than four hundred years after the Hijra.

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Page 70.—Having thus shown the importance of the Traditions, I now proceed to enter a little into detail on the question of the rules framed concerning them. The classification adopted by different authors may vary in some subordinate points, but the following account is adopted from a standard Muhammadan work. A Tradition may be Hadís-i-Qaulí, that is, an account of something the Prophet said; or Hadís-i-Fa'lí, a record of something which he did; or Hadís-i-Taqrírí, a statement of some act performed by other persons in his presence, and which action he did not forbid.

The Tradition may be classed under two general heads:—

First.—Hadís-i-Mutawátir, that is, "an undoubted Tradition," the Isnád, or chain of narrators of which is perfect, and in which chain each narrator possessed all the necessary qualifications for his office. Some authorities say there are only a few of these Traditions extant, but most allow that the following is one: "There are no good works

* The Káfi, by Abu Ja'far Muhammad, A.H. 329. The Man-lá-yastah-zirah-al-Faqíh, by Shaikh 'Alí, A.H. 381. The Tahzíb and the Istibsár by Shaikh Abu Ja'far Muhammad, A.H. 466. The Nahaj-ul-Balághat, by Sayyud Razí, A.H. 406.

except with intention," for example, a man may fast, but, unless he has the intention of fasting firmly in his mind, he gains no spiritual reward by so doing.

Second.—Hadís-i-Ahád. The authority of this class is theoretically somewhat less than that of the first, but practically it is the same.

This class is again sub-divided into two :—

(1) *Hadís-i-Sahíh*, or a genuine Tradition.—It is not necessary to go into the sub-divisions of this sub-division. A Tradition is Sahíh if the narrators have been men of pious lives, abstemious in their habits, endowed with a good memory, free from blemish, and persons who lived at peace with their neighbours. The following also are Sahíh, though their importance as authorities varies. I arrange them in the order of their value. Sahíh Traditions are those which are found in the collections made by Bukhárí and Muslim, or in the collection of either of the above, though not in both; or, if not mentioned by either of these famous collectors, if it has been retained in accordance with their canons for the rejection or retention of Traditions; or lastly, if retained in accordance with the rules of any other approved collector. For each of these classes there is a distinct name.

(2) *Hadís-i-Hasan.*—The narrators of this class are not of such good authority as those of the former with regard to one or two qualities; but these Traditions should be received as of equal authority as regards any practical use. It is merely as a matter of classification that they rank second.

In addition to these names, there are a number of other technical terms which have regard to the personal character of the narrators, the Isnád, and other points. A few may be mentioned.

(1) *Hadís-i-Z'aif*, or a weak Tradition.—The narrators of it have been persons whose characters were not above reproach, whose memories were bad, or who, worse still, were addicted to "bid'at," innovation, a habit now, as then, a crime in the eyes of all true Muslims. All agree that a "weak Tradition" has little force; but few rival theologians agree as to which are, and which are not, "weak Traditions."

(2) *Hadís-i-Mua'llaq*, or a Tradition in the Isnád of which there is some break.—If it begins with a Tábi' (one in the generation after that of the Companions), it is called "*Mursal*," the one link in the chain, the Companion, being wanting. If the first link in the chain of narrators begins in a generation still later, it has another name, and so on.

(3) Traditions which have various names, according as the

narrator concealed the name of his Imám, or where different narrators disagree, or where the narrator has mixed some of his own words with the Tradition, or has been proved to be a liar, an evil-liver, or mistaken; but into an account of these it is not necessary to enter, for no Tradition of this class would be considered as of itself sufficient ground on which to base any important doctrine.

It is the universally accepted rule, that no authentic Tradition can be contrary to the Qurán. The importance attached to Tradition has been shewn in the preceding chapter, an importance which has demanded the formation of an elaborate system of exegesis. To an orthodox Muslim, the Book and the Sunnat, God's word direct and God's word through the mind of the Prophet, are the foundation and sum of Islám, a fact not always taken into account by modern paneygyrists of the system.

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CHAPTER V., *page* 187.

THE PRACTICAL DUTIES OF ISLAM.

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Zakat.

Page 218. (4) There are two terms in use to express alms-giving. The first is Zakát (literally, "purification") or the legal alms due, with certain exceptions, from every Muslim. The second is Sadqa.

No. 15.—Appendix VII to the Memorial; being extracts from Morley's Digest of all Reported Cases decided in the Supreme Court of Judicature in India, in the Courts of the East India Company, and on appeal by the Privy Council, to be found in the Introduction to Vol. 1, commencing at page ccxxvii.

(2) THE MAHOMEDAN LAW.

(*a*) *On the Sources of the Law.*

Page CCXXVII.—The Muhamadan Law, like that of the Hindús, is professedly founded upon revelation; and the Korán, though variously interpreted, is regarded, by the Musulmáns of every denomination, as the fountain-head and first authority of all law, religious, civil, and criminal.

Whenever the Korán was not found applicable to any particular case, which soon happened as the social relations and wants of the Arabs became more extended, recourse was had to the Sunnah (precept and example), or Hadís (sayings, tradition), that is, the oral law, which was, and is at the present day, held to be only second in authority to the Korán itself. Thus the Korān and the Sunnah stand in the same relation to each other, as the Mikrah and Mishnah of the Jews: and it may be remarked, that the words in both the Arabic and Hebrew languages are derived from similar roots, and have the same significations.

The Sunnah or Hadís, the second authority of Muhammadan law, comprises the actual precepts, actions, and sayings of the Prophet himself, not written down during his lifetime, but preserved by tradition, and handed down by authorised persons. These precepts and traditions are divided into two classes, *viz.*, the Kads (holy), which are supposed to have been directly communicated to Muhammad by the angel Gabriel; and the Nabawí (prophetic), or those which are from the Prophet's own mouth, and are not considered as inspired; both these, however, have the force of law, and, with the Korán, constituted the whole body of the law at the time of Muhammad's death. "I leave with you," said the Prophet, "two things, which, so long as you adhere thereto, will preserve you from error: these are, the Book of God, and my practice."

In addition to the Korán and the Sunnah or Hadís, there are two other great sources of Muhammadan law, *viz.*, the Ijmáa (concurrence), and the Kiyás (ratiocination).

The Ijmáa is composed of the decisions of the companions of Muhammad (Sahábah), the disciples of the companions (Tábiûún) and the pupils of the disciples: these decisions are said to have been unanimous, and are next in authority to the Korán and the Sunnah.

Page CCXXIX.—The Kiyás, which is the fourth source of the Muhammadan law, consists of analogical deductions derived from a comparison of the Korán, the Sunnah, and the Ijmáa, when these do not apply either collectively or individually to any particular case. This exercise of private judgment is allowed, with a greater or less extension of limit, by the different Muhammadan sects; some, however, refusing its authority altogether.

Since it appears, then, that although the sources of the law are the same throughout the Muhammadan world, there is a variety in the manner of their reception, and in the laws derived from them, it becomes necessary to describe shortly the principal sects, and to state the chief points of difference in their opinions as to the sources of the law.

(*b*) *On the Principal Mohamedan Sects, and their Legal Doctrine* (CCXXIX).

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Page CCXXX.—These four principal sects, which are called after their founders, originated with certain eminent Mujtahid Imáms, named respectively Abú Hanífah, Mállik Ben Anas, Muhammad Ash Sháfií, and Ahmad Ben Hanbal. Two other Imáms were also the founders of Sunní sects: these were Abú Âbd Allah Sufyán as-Sauri, and Abú Dáwúd Sulaimán az-Záhiri, but they had but few followers; and a seventh sect, which had for its chief the celebrated historian| At-Tabarí, did not long survive the death of its author.

Abú Hanífah Nuamán Ben Sábit al-Kúff, the founder of the first of the four chief sects of Sunnís, and the principal of the Mujtahid Imáms who looked to the Kiyás as a main authority upon which to base decisions, was born at Kufáh in A.H. 80 (A.D. 699), at which time four, or, as some authors say, six of the companions of the Prophet, were still living. Abú Hanífah died in prison at Baghdad in A.H. 150 (A.D. 764), having been placed in confinement by the Khalífah Al-Mansúr, on account of his having refused to accept of the office of Kází from a conciousness of his own inefficiency; a refinement of modesty of which the Arabian lawyers may well be proud, since it is doubtful whether the biography of the juris-consults of all nations and ages would present another instance of the same self-denial and suffering from similar motives. Unluckily, however, for Abu Hanífah's character, his consistency does not seem to have equalled his conscientious self-depreciation; for we find that he was originally a strong partisan of the house of Alí; and it is even hinted that the cause of his subsequent change of opinion was to be traced to interested motives. The doctrine of Abú Hanífah, at first, prevailed chiefly in Irák; but afterwards became spread over Assyria, Africa, and Máwará an-Nahar. It is at present very generally received throughout Turkey and Tartary, and, together with that of his two disciples, Abú Yúsuf and Muhammad, is the chief, and, with but rare exceptions, the only authority which governs the Sunní law in India.

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Page CCXXXV.—These are the principal sects of the Muhammadans who differ in opinion with regard to legal doctrine. I have already stated that the Korán is universal in its authority; but this must be understood with the reservation that such authority depends upon its interpretation, and that the latter differs according to the

views of the principal commentators of the various sects, the Shíás more epecially rendering the meaning of many texts in a manner totally opposed to their acceptation by the sects of the Sunnis.*

The traditions and the Ijmáa are, in like manner, looked upon by all Musulmáns as authoritative in the second degree; but, as I have mentioned above, their value varies, and depends upon their Isnáds. Many writers on the religion and laws of the Muhammadans have asserted that the Shíahs reject entirely the authority of tradition. Nothing, however, can be more erroneous than this assertion, since all Shíâhs admit the legality of the Sunnah, when verified by any of the Twelve Imáms; and all equally venerate the precepts and examples, both of the Prophet and the Twelve Imáms themselves, and the traditions that have been handed down by the friends and partisans of Alí, rejecting only such portions of the Sunnah as are derived from persons contaminated by crime or disobedience to God. In the latter class they range all the traditions recorded on the authority of the three first Khalífahs, and of such of the companions, the Tábiûún, and their disciples, as were not included amongst the supporters of Âlí Ben Abí Tálib. The error with regard to the Shíah doctrine in matters of tradition seems to have arisen from the fact that our knowledge of their tenets has been almost entirely taken from Sunní sources, in which the word Sunnah is used to signify exclusively the traditions of the Sunnís; and also that the Shiâhs themselves almost invariably employ that word when speaking of the Sunní traditions, calling their own Hadis, and even referring to the Sunnís as the Ahl-í Sunnah (people of the Sunnah), in contradistinction to themselves, whom they generally call the Ahl-i Bait (people of the house of the Prophet). When, therefore, it is asserted that the Shiâhs reject the authority of tradition, it must only be understood to mean that they pay no regard to the Sunnah recorded by the enemies of Âlí: they of course repudiate the doctrines of the founders of the principal Sunní sects, holding their names even in abhorrence. What has been said with regard to the traditions as received by the Shiâhs, applies equally to the Ijmáa, the authority of which depends upon the source from whence it is derived.

The Kiyás, as I have mentioned in a former page, is variously received by the different sects. It seems pretty clear, from a tradition recorded in the Mishkát al-Masabih, that the exercise of private judgment was acknowledged and authorised by the Prophet himself. In the first, second, and third centuries of the Hijrah, the principal

* Referred to in paragraph 18, page 10 of the Memorial, and in paragraph 66, page 61 of Appendix VIII.

juris-consults appear to have founded their practice upon that of their predecessors; but some, venturing to rely upon analogical deduction from the first three sources of the law, were called Mujtahids, because they employed the utmost efforts of their minds to attain the right solution of such questions of law as were submitted to their judgment.

Amongst the Sunní sects, Mujtahids are classed under three principal divisions, according to the degree of Ijtihád which they may have attained. The word Ijtihád signifies, in its most common acceptation, the striving to accomplish a thing, the making a great effort; but in speaking of a law-doctor, it denotes the bringing into operation the whole capacity of forming a private judgment relative to a legal proposition.

The chief degree of Ijtihád conferred on its possessor a total independence in legislative matters, and he became, as it were, a connecting link between the law and his own disciples, who had no right to question his exposition of the Korán, the Sunnah, and the Ijmáa, even when apparently at variance with those elements or sources of jurisprudence. The Mujtahids of this first class were very frequent in the three first centuries of the Hijrah; but in later times, the doctrines of the law becoming more fixed, the exercise of private judgment, to an unlimited extent, soon ceased to be recognized. Some later doctors, At-Tabarí and As-Suyúti for instance, claimed the right, but it was refused to them by public opinion. The Mujtahids of the first class, who lived in the first century of the Hijrah, are esteemed as of higher authority than those who flourished in the second and third.

Those Mujtahids, who had arrived at the second degree of Ijtihád, possessed the authority of resolving questions not provided for by the authors of the chief sects, and were the immediate disciples of the acknowledged Mujtahids of the first class, who, in some instances, allowed their pupils to follow and teach opinions contrary to their own doctrines, and occasionally even adopted their views.

Those who had attained the third degree of Ijtihád were empowered to pronounce, of their own proper authority, sentences in all cases not provided for by the founders of the sects or their disciples. Their sentences were, however, to be derived from a comparison of the Korán, the Sunnah, and the Ijmáa, taken conjointly with the opinions of the Mujtahids of the first and second classes; and they were not authorised to controvert their published doctrines, either respecting the elements of the laws, or the principles derived therefrom. Mujtahids of the third class were required to possess a perfect knowledge of all

the branches of jurisprudence, according to the doctrines of all the schools; and the class comprises a large number of doctors, of greater or less celebrity, some of whom were raised to the rank during their lifetime, but the greater portion subsequently to their decease.

As a title, the term Mujtahid has long since fallen into disuse amongst the Sunnis.*

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(*c*) *On the Mohamedan Law Books* (CCXLI).

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Page CCXLV.—It will be readily conceived, from the details above given, that any attempt to give even a tolerably complete list of the Muhammadan law-books would far exceed the limits of this Introduction. I have endeavoured, however, in the following pages, to make such a selection from the mass as may prove useful to the student, and to enumerate and describe all such as have been printed, as well as some of the works still in MS. which are of chief authority amongst the different sects, and more especially those which are in the greatest repute, and most frequently referred to in India. I may add, that I have examined the originals of the works described, whenever they were procuable; and that, where the works themselves were not to be met with, I have invariably derived my information from the native authorities, with the exception, however, of a few instances, when other sources will be found indicated in the notes.

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Page CCXLVIII.—The Korán is believed by all orthodox Musulmáns to be uncreated and eternal, subsisting in the very essence of God, and revealed to Muhammad by the angel Gabriel, at different times during a space of twenty-three years. Wherever its texts are applicable, and not subsequently abrogated by others, they are held to be unquestionable and decisive, as the word of God transmitted to man by the last, or, as he is emphatically called, the Seal of the Prophets, Muhammad the messenger of God.

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Page CCLII.—The first collections of traditions said to have been written down, are those of Abú Bakr Ben Shiháb az-Zuhrí; Âbd

* Ibukhall, Vol. I. Introduction, page XXVI note.

al-Málik Ben Juraij; Málik Ben Anas, the founder of the second sect of Sunnís, in his work called the Muwatta; and Ar-Rabía Ben Subaih. It has not been ascertained which author is entitled to priority. Az-Zuhrí is considered to have been the first by As-Suyútí and Al-Makrízí; whilst others give the preference to the Muwatta, or to the compilations of Ibn Juraij or of Ar-Rabía. The preponderance seems, however, to be in favour of Âbd al-Málik Ben Juraij.

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Page CCLIII.—Whichever of the collections above mentioned may be entitled to precedence, the chief authorities in matter of tradition among the Sunnís are now the books which are known by the name of the Síx Sahíhs, or Six Books of the Sunnah; whilst the Shíahs have their own four books of Hadís, which, though less generally known, are by them equally venerated, and esteemed above all others on the same subject.

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Page CCLXI. III.—Having so far described the works on the traditions, it becomes necessary to give some notices of the general Digests and special Treatises, with their Commentaries, which, together, form the third class of law-books, according to the present arrangement, and treat more especially of practical jurisprudence in all its branches. These, as may be imagined, are exceedingly numerous; and it would be impossible, in this place, to give more than the following meagre selection.

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Page CCLXII.—Abú Hanífah's principal work is entitled the Fikh al-Akbar: it treats of the Ilm al-Kalám, and has been commented upon by various writers, many of whom are mentioned by Hájí Khalfah.

The Hanafí sect, as has already been remarked, is the one which obtains most commonly, and indeed almost entirely, amongst the Muhammadans of India; but the doctrines of its great founder are sometimes qualified, in deference to the opinions of two of his most famous pupils. Sir William Jones says, that "although Abú Hanífah be the acknowledged head of the prevailing sect, and has given his name to it, yet so great veneration is shewn to Abú Yúsuf, and the lawyer Muhammad, that, when they both dissent from their master, the Mussalman judge is at liberty to adopt either of the two decisions

which may seem to him the more consonant to reason, and founded on the better authority."

In former times it seems that Abú Hanífah's opinion was preferred, even when both the disciples dissented from him; but this is not the case at the present day. There is also a distinction of authority to be observed, *viz.*, that where the two disciples differ from their master and from each other, the authority of Abú Yúsuf, particularly in judicial matters, is to be preferred to that of Muhammad. In the event, however, of one disciple agreeing with Abú Hanífah, there can be no hesitation in adopting that opinion which is consonant with his doctrine.

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Page CCLXVII.—The Hidáyah is the most celebrated law treatise according to the doctrines of Abú Hanífah, and his disciples Abú Yúsuf and the Imám Muhammad, which exists in India: it is a Commentary on the Badáía al-Mubtadá, and both the text and comment are from the pen of Burhán ad-Dín Âli Ben Abú Bakr al-Marghínání, who, after employing thirteen years in writing the Hidáyah, died in A.H. 593 (A.D. 1196). The divisions and general arrangement of the Hidáyah, are taken from the Jámia as-Saghír of the Imám Muhammad, and it consists of a Digest of approved law cases, illustrated by proofs and arguments. Hájí Khalfah says, in describing the Hidayah, "it is a practice observed by the composer of this work to state first the opinions and arguments of the two disciples (Abú Yúsuf, and the Imám Muhammad); afterwards the doctrine of the great Imám (Abú Hanífah); and then to expatiate on the proofs adduced by the latter, in such manner as to refute any opposite reasoning on the part of the disciples. Whenever he deviates from this rule, it may be inferred that he inclines to the opinions of Abú Yúsuf and the Imám Muhammad. It is also his practice to illustrate the cases specified in the Jámia as-Saghír and Kudúrí, intending the latter whenever he uses the expression 'he has said in the book.' In praise of the Hidáyah it has been declared, like the Korán, to have superseded all previous books on the law; that all persons should remember the rules prescribed in it; and that it should be followed as a guide through life."

The same motive which dictated the compilation of the Hindú Code, induced Warren Hastings to recommend that a translation should be made into English of the Hidáyah; and accordingly Mr. Hamilton undertook the task; unfortunately, however, it was suggested by the Muhammadan lawyers who were consulted on the occasion,

that inasmuch as the idiom of the author was particularly close and obscure, a Persian version should be first made "under the inspection of some of their most intelligent doctors, which would answer the double purpose of clearing up the ambiguities of the text, and, by being introduced into practice, of furnishing the native Judges of the Courts with a more familiar guide, and a more instructive preceptor, than books written in a language of which few of them have opportunities of attaining a competent knowledge." This was accordingly done; and from this Persian translation Mr. Hamilton executed his English version, which is thus rendered less to be depended upon, than if it had been made from the original Arabic, without adding in any degree to its intelligibility. The work of Burhán ad-Din Alí as we possess it in this translation, is, however, a most useful book, although it contains much that is unimportant, and omits altogether the Law of Inheritance, which is perhaps the most important of all.

The text of the Hídáyah was published in the original Arabic at Calcutta in A.H. 1234 (A.D. 1818), and was again edited, together with its Commentary, the Kifáyah, by Hakím Maulaví Âbd al-Majíd in 1834. The Persian version was also published at Calcutta in the year 1807.

A work of such great celebrity and authority as the Hidáyah has of course been illustrated by a large number of Commentaries, the first of which is said to have been written by Hamíd ad-Dín Alí al-Bukhárí, who died in A.H. 667 (A.D. 1268), and is a short tract entitled the Fawáíd. The glosses of the Hidáyah which are most conspicuous for their reputation in India, are the Niháyah, the Ínáyah, the Kifáyah, and the Fath-al-Kadír.

The Niháyah of Husám ad-Din Husain Ben Âlí, who is said to have been a pupil of Burhán ad-Dín Âlí, was the first composed of these; and it is important as supplying the omission of the Law of Inheritance in the Hidáyah, although the chapter on this law is said not to be looked upon as of equal authority with the Faráíz as-Sirájíyah, which will be hereafter described.

There are two Commentaries on the Hidáyah entitled Ináyah; but the one more commonly known by the name was written by the Shaikh Akmal ad-Dín Muhammad Ben Mahmúd, who died in A.H. 786 (A.D. 1384). The Ínáyah is much esteemed for its studious analysis and interpretation of the text.

The Arabic text of the Ínáyah was published in Calcutta in 1837, edited by Ramdhan Sen.

The third Commentary, the Kifáyah, is by Imám ad-Dín Amir Kátib Ben Amír Umr, who had previously written another

explanatory gloss of the same work, and entitled it the Ghâyat al-Bayán. The Kifáyah was finished in A.H. 747 (A.D. 1346), and, besides the author's own observations, gives concisely the substance of other Commentaries.

The original text of the Kifáyah, accompanied by that of the Hidáyah, has been published as mentioned above.

The Fath al-Kadír lil-Âájiz al-Fakir, by Kamál ad-Dín Muhammad as-Siwásí, commonly called Ibn Hammám, who died in A.H. 861 (A.D. 1456), is the most comprehensive of all the comments on the Hidáyah, and includes a collection of decisions which render it extremely useful.

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Page CCLXXII.—These are the principal law-books of the third class that are known, and are of authority among the Sunnís of the Hanafí sect in India; but, as may be imagined, it is only a few of these that are quoted in the Courts; the Hidáyah and its comments, illustrated by the books of Fatáwa, generally sufficing to satisfy the Judges, and to offer sufficient grounds on which to base a decision.

Many works according to the doctrines of Abú Hanífah have been written, and are received as authorities in the Turkish empire. These I apprehend would be admissible if quoted in our Courts in India where the parties to a suit are of the Hanafí persuasion.

The most celebrated of these is the Multaka al-Abhár, by the Shaikh Ibráím Ben Muhammad al-Halabí, who died in A.H. 956 (A.D. 1549). This work, which is a universal code of Muhammadan law, contains the opinions of the four chief Mujtahid Imáms, and illustrates them by those of the principal juris-consults of the school of Abú Hanífah. It is more frequently referred to as an authority throughout Turkey, than any other treatise on jurisprudence.

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Page CCXXXIV. V.—Having described to this extent the comments on the Korán, the books of traditions, and the general and particular treatises on jurisprudence and special laws of the different sects, the fifth class of works, which treats of the Ilm al-Fatáwa, or science of decisions, remains to be noticed. These are very numerous, amounting to several hundreds: the greater portion, however, are either unknown, or never used in India.

Almost all these collections have the title of Fatáwa, but some appear under other designations. Some give the decisions of particular lawyers, or those found in particular books; others, those which tend to

illustrate the doctrines of the several sects; whilst others again are devoted to recording the opinions of the learned jurists, who were natives or residents of certain places, or lived at certain times. It will be necessary here to mention only a few of these works.

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Page CCLXXXV.—The Fatawá Kází Khán, or collection of decision, of the Imám Fakr ad-Dín Hasan Ben Mansúr al-Uzjandi al-Farghání, commonly called Kází Khán, who died in A.H. 592 (A.D. 1195), is a work held in the highest estimation in India, and indeed is received in the Courts as of equal authority with the Hidáyah of Burhán ad-Dín Âli, with whom Kází Khán was a contemporary: it is replete with cases of common occurrence, and is therefore of great practical utility, the more especially as many of the decisions are illustrated by he proofs and reasoning on which they are founded. Yúsuf Ben Junaid, generally known by the name of Akhí Chalabí-Tú kátí, epitomised Kází Khán's work, and compressed it into one volume.

The Fatáwa Kazí Khán was lithographed and published in the original at Calcutta in the year 1835.

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Page CCLXXXVIII.—The Tanwír-al-Absár, by the Shaikh Shams ad-Dín Muhammad Ben Abd Allah al-Ghazzí, who composed this work in A.H. 995 (A.D. 1586) is enriched with a variety of questions and decisions, and seems to come within the present class of law-books. It is considered to be one of the most useful books according to the Hanafí doctrines, and has been frequently commented upon. The most noted of these commentaries are, the Manh al-Ghaffár, which is a work of considerable extent, by the author of the Tanwír al-Absár himself; and the Fatáwa Durr al-Mukhtár, which was written in A.H. 1071 (A.D. 1660), by Muhammad Âlá al-Din Ben Shaikh Âlí al-Hiskafí. Both these commentaries contain a multitude of decisions, and are well known in India.

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Page CCLXXXIX.—Of the collection of decisions now known in India, none is so constantly referred to, or so highly esteemed, as the Fatáwa al-Âálamgírí; and although, as has been stated, the Fatáwa Kází Khán is reckoned to have an equal authority with the Hidáyah, it is neither so generally used, nor so publicly diffused as the Fatáwa al-Âlamgírí. The latter work, from its comprehensive nature, is applicable

in almost every case that arises involving points of Hanafí law, and is on that account produced and quoted as an authority, almost every day, in the Courts in India. The Fatáwa al-Âálamgírí was commenced in the year of the Hijrah 1067 (A.D. 1656), by order of the Emperor Aurangzéb Âálamgír, by whose name the collection is now designated. It contains a bare recital of law cases, without any arguments or proofs; an omission which renders it defective for elementary instruction. The immense number of cases, however, compensate in some measure for this want, which is, moreover, supplied by the Hidáyah, and other works; and the insertion of argument can the more readily be dispensed with, since the opinion of the modern compilers could not have been esteemed of equal authority with those of the older writers on jurisprudence; and the mere decisions, without comment or explanation, are equally applicable to particular cases, when illustrated and explained by reference to works of authority as text-books. The Fatáwa al-Âálamgírí was translated into Persian by order of Âálamgír's daughter, Zéb an-Nisá.

The orginal Arabic text of the Fatáwa al-Âálamgírí was printed and published at Calcutta in the year 1828, in six large quarto volumes.

A translation into Persian of the books on Jináyát and Hudúd, from the Fatáwa al-Âálamgírí, was made by order of the Council of the College of Fort William at Calcutta, by the Kází al- Kuzát Muhammad Najm ad-Dín Khán, and was published in the year 1813, together with a Persian treatise on Taazírát by the same author, in the same volume with the translation of the book on Taazírát from the Fatáwa Durr al-Mukhtár already mentioned.

Mr. Neil Baillie has recently published a translation of selected portions from two books of the Fatáwa al-Âálamgírí that comprise the whole subject of sale. "The rule adopted in making the selections," says Mr. Baillie, "was to retain everything of the nature of a general proposition, but to reject particular cases, except when they were considered to involve or illustrate some principle or maxim of law." The translator has executed his task in a most able manner, and, by preserving the divsion and arrangement of the original into chapters and sections, has rendered reference to the Arabic text a matter of no difficulty to the Oriental scholar. He has added throughout explanatory notes, which might, perhaps, have been extended with profit to the student. This work is a most imporant addition to the translated treatises on Mahomedan Law; and, being printed at the public expense, affords an additionl instance of the reiterated and judicious liberality of the Honourable Court of Directors in patronising works tending to benefit India.

No. 16.—Summary of the contents of the notes of Argument as contained in Appendix VIII to the Memorial.

1. A Wakf is essentially different from a gift. Therefore the condition requiring the absence of perpetuity in gift does not involve the consequence that a similar condition is necessary in Wakf, that is to say, that condition does not require that Wakf likewise should be free from the objection of perpetuity.

2 Reason for perpetuity being void in sale or gift according to Mahomedan Law.

3 and 4. Reasons against perpetuity in English Common Law do not apply to Mahomedan Law, which is founded wholly on Religion and is absolutely mixed up with it. If perpetual *Suwab* can be obtained by means of a perpetuity, there is no objection to a perpetuity. The best use of property is to make it conducive to *Suwab*. All Mahomedan institutions have religious notions for their foundation, *e.g.*, Gifts, Sales, Wills, and Wakfs.

5. Difference between a Gift and a Wakf. Wakf is for consideration.

6. Wakf is a kind of *Sudka*. Distinction between *Sudka* of lands and Wakf of lands. The motive in both is to obtain *Suwab*, and *Suwab* is the consideration in both, but in *Sudka* the lands are transferred, and in Wakf the lands are tied up.

7. What is a *Sudka*.

8. In *Sudka* there is a consideration which consists of *Suwab*. Promise of God to give *Suwab* is sufficient consideration.

9. Text of the Koran on *Suwab*.

10. The motive in making *Sudka* is to get *Suwab*. The object of *Sudka* might be the rich as well as the poor. In *Zakat* or poor rate, the rich and certain relations cannot participate.

11. To make *Sudka* is not obligatory but praiseworthy: but to give *Zakat* is obligatory.

12. A Mahomedan is free to dispose of property provided the right of heirs does not fetter him. When is the right of heir a fetter?

13. A Mahomedan in health is able to make any disposition of his property even if it involves perpetuity.

14. Bearing of indebtedness on the right to make Wakf.

15. The institution called Wills is based on traditions and religious considerations similar to those which constitute the foundation of Wakf.

16. Distinction between the motive of a Wakf and its object: confusion of ideas guarded against. Hamilton's mistake that the object must be pious and charitable, corrected by Baillie.

17. Correct view of motive and object. The motive is to get *Suwab*, and the object must be such as is calculated to bring *Suwab*, not according to natural religion or a universal code of morality, but according to the religious belief of the Mahomedans.

18. Mr. Hamilton's incorrect translation of Aboo Huneefa's definition of Wakf, as involing *Sudka*, is the foundation of the mistake that the object and purpose of a Wakf must be pious and charitable. Correct translation of Aboo Huneefa's definition of Wakf given.

19. To arrive at a correct notion of Wakf, you must find out upon what point relating to Wakf, Mahomedan Lawyers are agreed and wherein they differ. New element of divergence should not be introduced. There is perfect unanimity in regard to what ought to be the motive of a Wakf and its object: and this unanimity arises because the perception of the motive and object is based on the Mahomedan religion, which is common to all. Wakf itself involves perpetuity according to the agreement of all.

20. Wakf, according to Aboo Huneefa, involves *Sudka* of profits upon the poor or upon any of the many ways of *Khyr* or means for obtaining future reward.

21. Wakf, after it has been made, is, according to Aboo Huneefa, permissible but not obligatory. Reason for its not being obligatory consists not in its being liable to the objection of perpetuity but consists of principles which are fairly traceable to, and which fairly arise out of, the Mahomedan Law.

22. Reasons which induced Aboo Huneefa to hold that Wakf is not obligatory even after it has been made, refer to the text of the Traditions of the Prophet, as construed by him.

23. Futher elucidation of those reasons.

24. Substance of the argument of Aboo Huneefa set forth in other words.

25. How, according to Aboo Huneefa, a Wakf after it has been made, could be rendered obligatory so that it becomes no longer capable of being avoided—decree of the Kazy in a *Moojtahid-fee* matter.

26. Aboo Huneefa agrees with Aboo Yusoof and Mahomed as regards the motive of a Wakf and its object.

27. Aboo Huneefa's objections are negatived by Aboo Yusoof and Mahomed.

28. One argument of Aboo Huneefa, based on a Text of the tradition of the Prophet, namely, there is no detention of property from rules of inheritance—refuted.

29. Another objection of Aboo Huneefa, based on another text

of the tradition of the prophet—*viz.*, that the prophet sold Wakf property—refuted.

30. Another objection of Aboo Huneefa refuted, *viz.*, that the Wakf property must necessarily remain in the ownership of the Wakf, otherwise how could the conditions laid down by him to regulate the Wakf, be held valid.

31. Aboo Huneefa's view that Wakf, after it has been made, is not obligatory, has not been recognised and received as correct Mahomedan Law.

32. Aboo Yusoof and Mahomed support their views that Wakf, after it has been made, is obligatory by citing authority and by reasoning from analogy. The authority is the direction of the prophet to Oomur, his companion, to make Wakf of *Samgh*.

33. Wakf is obligatory after it has been made, according to the two disciples, in order to enable the Wakif to receive *Suwab perpetually*.

34. Wakf of the prophet and of Abraham and of the companions constitute precedents which are authority of a binding nature.

35. It is the duty of the *Mujtahid* and *Imam* to see the relevancy and force of authority so as to deduce rules of action in regard to Wakf or in regard to any other question. The *Mookullids* or followers are not allowed to test the conclusion of the *Imam* and *Mujathid*, inasmuch as their indifferent and scanty knowledge on the subject is not calculated to lead them to a correct decision. This is a well-settled principle of Jurisprudence. Sell's faith of Islam shews how vast should be the extent of a *Moojtahid's* knowledge and information, and how complicated are the rules of the science of Jurisprudence or *Ilm-i-Oosool*. Conflict between conscience and conduct should be avoided.

36. Difference between Mahomed and Aboo Yusoof. Mahomed says the object should be expressly perpetual, and Aboo Huneefa supports him.

37. Aboo Huneefa found difficulty only at the beginning. After a Wakf becomes obligatory he agrees with one or other of his disciples.

38. Aboo Yusoof's view. For the validity of a Wakf the object stated need not be perpetual, because *Suwab* is sometimes derived from a thing not perpetual. Wakf itself involves the idea of perpetuity, and after the failure of the object, the profits should go to the poor.

39. According to Aboo Yusoof, a Wakf is good when it is on the man's children or on his Oommi Walud. This is a direct and positive authority of the Imam in favor of the proposition submitted; and such an authority cannot be disregarded without affront to the Mahomedan Religion and without in effect repealing the Mohamedan Law.

40. The object of Wakf, according to all the three Imams, must be of a nature capable of yielding *Suwab*. In addition to that element, Aboo Huneefa and Mahomed require that the object mentioned should be perpetual. Aboo Yusoof does not require that the object mentioned should be perpetual. Therefore it is a good Wakf when it is made on children and descendants, and on their failure to the poor. The ruling in I.L.R., 13 Mad. Ser., page 66, and 10 Bomb. High Court, page 7, having not, therefore, laid down the correct law, the Judges were misled by Hamilton's mistake; and Johnson's Dictionary and Wilson's Glossary were not calculated to explain the real meaning of the *Hedaya*: I.L.R., 6 Cal. Series, page 744, deals with the tradition of the prophet. This tradition was not cited by Aboo Yusoof to shew the validity of a Wakf on children, on which question there was no difference, but to shew the validty of a validate Wakf on one's self, because Mahomed differed from him on this question.

41. Another point of difference between Aboo Yusoof and Mahomed is how a Wakf is constituted.

42. In this matter, Aboo Huneefa sides with Mahomed.

43. Another point of difference between Aboo Yusoof and Mahomed is whether a man can make Wakf on himself, and can appoint himself a *Mootwally*.

44. Reasons assigned for Aboo Yusoof's view: the object in making Wakf is to get *Suwab*, and that is obtained by maintaining one's self.

45. Aboo Huneefa probably agreed with Mahomed in holding that a man cannot make Wakf on himself.

46. Aboo Yusoof's view is the governing authority, and therefore a Wakf on one's self and his children is lawful. Wakf is an institution which should be encouraged.

47 and 48. A mistake in Hamilton corrected.

49. Wakf on one's children and thereafter on the poor is valid without difference: Aboo Yusoof validates Wakf on one's self and the owner can appoint himself a *Mootwally*.

50. Mahomed subordinates *Suwab* to other considerations, when he lays down that Wakf on one's self is not valid: Aboo Yusoof subordinates other considerations to *Suwab* when he validates such a Wakf.

51. The whole of the Law of Wakf is based on the theory of *Suwab*.

52 and 53. Authorities cited in support of the proposition advanced in paragraph 51.

54 and 55. Islam is not a condition to the validity of Wakf: still a Wakf depends on the idea of *Koorbut* or *Suwab*.

56 and 57. Conclusive instance that the theory of *Suwab* must regulate the validity of a Wakf and not the idea of perpetuity. If a Moslem becomes an apostate, his Wakf falls to the ground.

58. What is the idea of *Suwab ?* To what object should it relate to be useful ? *Suwab* is obtained by the doing of any act of self-denial with a pure motive.

59. Acts conducive to *Suwab* must be ascertained from the Mahomedan Law. Validity of a Mahomedan Wakf could not be ascertained by reference alone to *Suwab* according to Zimmee ideas; when a Zimmee Wakf does not depend solely on the Zimmee ideas of *Suwab*, but must also involve the Islamic idea of *Suwab*, then how can a purely Mahomedan Wakf exclude the Islamic idea of *Suwab ?*

The Mahomedan Law is immutable.

60. In a Wakf the *Suwab* from the *moonfaut* or *profits* reverts to the owner.

61. What acts or objects are productive of *Suwab* according to the Mahomedan Law as laid down by authorities accepted by approved Text-writers.

The *Hedaya* has not left undetermined the question whether Aboo Yusoof's view is the governing authority. According to the *Hedaya*, the view of Aboo Yusoof is the governing authority.

62. I.L.R., 11 Bomb. Series, page 492, laying down that the *Hedaya* does not decide between Aboo Yusoof and Mahomed, is therefore wrong.

63 to 65. Notice of further authorities of the same character as in paragraph 61 and which are accepted by similar Text-Writers.

66. The authorities stated in paragraphs 61 and 63 to 65 constitute precedents for Wakf, and have been received and accepted as binding in the school which governs this case. They denote acts by which *Suwab* is obtained.

The Mahomedan Law is Divine in its origin, and, therefore, decision of British Indian Courts to the contrary are not be taken as the Mahomedan law. The sources of the Mahomedan Law pointed out. Constructions of the divine texts by *Moojtahids* and *Imams* and the evolution of the Mahomedan Law as expounded by them is binding on conscience and conduct. The *Kazy* must decide according to what is so binding. The British Legislation has preserved the Mahomedan Law of Wakf to the Mahomedans, and that law is as laid down by Aboo Yusoof. The Privy Council have in effect nullified Aboo Yusoof's Rule and thus repealed the Mahomedan Law. The authority of Text-writers has been noticed by Mr. Morley.

67. The Mahomedan Law strictly guards against the admission

of decrees unsupported by the Koran or the *Soonnat* or the opinions of Mahomedan Doctors.

68. The Privy Council decisions dealing with Hindu Law texts of ancient sages lay down how those texts are to be construed, and how the construction ought to be approached: "Nothing at variance with religion is likely to have flowed from such a source." "Nothing from any foreign source should be introduced; nor should courts interpret the text by the application to the language of strained analogies." "Approaching this somewhat delicate subject with an unfeigned desire to decide it in harmony with the religious feelings of the Hindus, &c."

Again, "The duty of a European Judge is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district, &c., &c."

69. Summary of argument and propositions established.

No. 17.—Appendix VIII to the Memorial; being Notes of argument of Maulvi Mahomed Yusoof, B.A., B.L., Khan Bahadoor, in support of the validity of Wakfs on one's self and his descendants according to the Mahomedan Law.

1. The rule against perpetuities has no connection with the law of Wakf, and Wakf cannot be controlled by that rule, because that rule has reference to the law of Gifts, and the law of Wakf is not a branch of the law of Gifts. So far as gifts are concerned, the Mahomedan Law is not open to the objection that it contravenes the rule against perpetuities, and it is not my contention that, under the Mahomedan Law of Gifts, property could be tied down for an indefinite period. On the contrary, if a gift is made, the property becomes vested in the donee absolutely and immediately, and he becomes the owner, and obtains full power of disposal.

2. So also in the case of a sale. You cannot sell property without making it vest absolutely in the purchaser. As in the case of an ordinary gift the property vests in the donee so also in the case of a sale. Any attempt to regulate succession to an estate sold or given in gift, or to attach a condition to its tenure, is void under the Maho-

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* Referred to in paragraph 11, page 6; para. 12, page 7; para. 15, page 9; para. 16, page 9; para. 17, page 10; para. 18, page 10; para. 19, page 11; para. 20, page 11; para. 29, page 14; and para. 30, pages 15 and 16 of the Memorial.

medan Law, as tending to destroy the very object of sale or gift; in such cases the sale or gift is good and absolute, and the condition is void. The property having vested in the purchaser or the donee by words of sale or gifts, it ceases to belong to its original owner so as to enable him to attach conditions; and there is no such thing as a partial vesting of property or vesting only for life by means of words of sale or gifts; in other words, there are no words of sale or gifts by which ownership can be transferred only partially and not absolutely.

3. The reasons, according to the English common Law, for disallowing the tying up of property in cases of settlements as meaning conveyances by way of provision for a family, are set forth by English Text-writers. Although the tying up of property had been allowed for generations in England, still the consequences being detrimental to the holding of property from a worldly or secular point of view, the same came to be disallowed later on; so that as the English Law now stands property cannot be entailed indefinitely as prejudicial to "that free and active circulation of property, which is one of the springs as well as the consequences of commerce." By such entail "the improvement of land is checked; its acquisition rendered difficult; the capital of the country is gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished." But the Mahomedan Law made entails void ever since the law was established: it does not allow them even to the limited extent now recognised elsewhere. So that what it had taken ages in other countries to accomplish, existed already in the Mahomedan Law from the very beginning.

4. But in the other countries law is untrammelled by religious considerations; the only point which that law has in view is progress in a worldly sense: not so according to the Mahomedan Law. Legal considerations and, in fact, all considerations must give way to religion; in fact, law is religion and religion is law. Law and religion are mixed up and intertwined with each other according to Mahomedans, and the origin of law is religion. And as will appear later on, the best use of property is that which secures to the owner religious merit and religious reward in the world to come. "Necessity requires that a Wakf should be obligatory in order that the Wakif might receive *Suwab* or religious merit perpetually." (See page 52, paragraph 33). In regard to the intimate connection between law and religion it will be noticed that every disposition of property is either based on authority of a religious character, such as the text of the Koran or tradition of the prophet, or has for its object something of a religious nature. There is nothing in the law which cannot be traced to religion. Take for instance *Hiba*

or gift. The author of the *Doorool Mookhtar* says at page 634, Calcutta edition of 1856—

در المختار صفحه ٦٣٣ تا صفحه ٦٣٤ و هو لغة التفضل على الغير ولو غير مال و شرعا تمليك العين مجانا اي بلا عوض لان عدم العوض شرط فيه + + + و سببها ارادة الخير للواهب دنيوي كعوض ومحبـــة و حسن ثناء و اخروي قال الامام ابو منصور يجب على المؤمن ان يعلم ولده الجود و الاحسان كما يجب عليه ان يعلمه التوحيد و الايمان ان حب الدنيا راس كل خطيئة نهايه و هي مندوبة و قبولها سنة قال عليه الصلوة و السلام تهادوا تحابوا *

"And according to the dictionary Gift is to do favour to another, although the favour might be in respect of what is not property. And according to the Shera, Gift is to make another owner through kindness, that is, without consideration; because absence of consideration is a condition in the same." * * "And the cause of gift is the intention that good might come to the donor in this world; as for instance, to get something in lieu of the same, or get loved or get praised favourably; or that good might come to the donor in the other world: Imam Aboo Munsoor says, 'And it is obligatory on a true believer to teach his children to be generous and to oblige others, as it is obligatory on him to teach them the unity of God, and what is true belief, because the love of this world is the origin of all sinfulness: so laid down in the Nihaya.' And to make gift is *mundoob* or laudable, and to accept the same *soonnut* or in accordance with the teachings of the prophet. Says the prophet, on whom be peace, 'make gifts amongst each other and create love amongst each other.'" The text of the Koran from which the origin of the institution of gift is traced is given in the Arabic Kefaya, Volume III, page 673. Then the Doorool Mookhtar says at page 638 :—

در المختار صفحه ٦٣٨ و اذا تصدق بعشرة دراهم او وهبها لفقيرين صح لان الهبة للفقير صدقة و الصدقة يراد بها وجه الله تعالى و هو واحد فلا شيوع *

"Therefore if a person makes *Sudka* in respect of 10 *dirhams*, or makes a gift of the same to two poor persons, this is valid; because to make a gift to a poor man is to make *Sudka* to him: and by *Sudka* is meant to seek the favour of God, who is one and the same, and therefore there is no *moosha* (or confusion)."

So also in the Arabic Kefaya, Volume III, page 1, the institution of sale is traced to the text of the Koran "And God has legalised sale and has rendered usury unlawful." و احل الله البيع و حرم الربوا As regards Wills, the origin of it will be found discussed further on in page 47.

paragraph 15. As regards Wakf the authorities and texts in favour of it are numerous.

5. But a Wakf is essentially and radically different from a gift or *hiba*: by the latter the *Ayn* or substance of a thing is transferred by one person to another person: by the former there is no transfer of the *Ayn* or substance from one person to another, but the *Ayn* or substance is transferred to God (and is thus suspended and tied down) with a direction that the fruits or profits should be applied to the purposes of man, who never becomes owner even of those fruits or profits (which are to be produced in future and are at present non-existent), not to say of the substance: of course, after a person has received the fruits and profits, he becomes their owner, but before he has received them he is not their owner. Again, gifts is without consideration, and, therefore, under certain circumstances, it could be resumed: but Wakf is for a consideration, the consideration being *Suwab* or religious merit.

6. It is essentially necessary to realise with precision what view the Mahomadan Lawyers have taken of the nature of a Wakf. Wakf is a kind of *Sudka*, which Mr. Hamilton has erroneously, as shewn later on (see page 48, paragraph 16 and page 49, paragraph 18), translated into Alms-gift (see Hamilton's *Hedaya*, Volume II, page 334). *Sudka* is a particular kind of disposition, which has *Suwab* or religious merit as the consideration, and which includes both moveable and immoveable property, and might consist of the substance or of the profits, and might involve the element of prepetuity or not. Wakf is a disposition of the like kind with *Sudka*, but restricted to immoveable property, and involves the element of perpetuity. Baillie in his Digest at page 546 says, "Helal, the son of Yehea (printed in Baillie's Digest by a misprint as *John*) has said in his treatise on Wakf or appropriation that if one should say * * 'This my land is a *Sudka*' and point it out, without specifying the boundaries, it would be a *Sudka*, because land is sufficiently made known when pointed out. * * Such a *Sudka* would be a *tumleek* or transfer of property, and not a Wakf or appropriation." The meaning of it is, that the land shall become the property of the poor, and it shall be divided amongst them, and shall become their property, and they shall have the power of sale, and the property shall be subject to inheritance by their heirs. The disposition here relates to the substance of the property, in consideration of *Suwab*: what distinguishes it from Wakf is that in the case put by Helal the substance is transferred, and therefore also the profits, but in Wakf the substance is detained, so that the ownership remains with God, and is not transferred to a particular individual, but the profits go to persons who are the objects of the Wakf.

Another passage cited by Mr. Baillie is at page 546 in these words :— "When a man has said, 'I have given the income (*Ghullut*) of this my mansion as a *Sudka* for *miskeen* or indigent persons,' or has said, 'This my mansion is *Sudka* for indigent persons' he is to be commanded while he lives to distribute it in charity; but if he should die before the distribution, the produce and the mansion would both belong to his heirs; and if while alive he should give the value in charity it would be lawful." Here the land continues in the ownership of the proprietor, who does not part with that ownership either in favor of the indigent or in favour of God; therefore, there is no transfer of the substance of the thing: and there is consequently no *tumleek* and no Wakf, but the proprietor bestows the profits in *Sudka* in order to get *Suwab*: when the poor actually get the profits, then the owner gets the *Suwab*: if there is no distribution of the profits before the man's death, the disposition falls through, and he gets no *Suwab*, which is the consideration for the enjoyment of the profits; and the property, which was never parted with, passes to the heirs: and the accumulations or the undistributed profits also pass to the heirs, because they would become *Sudka* when received by the poor, which was never done here.

7. It is, therefore, very necessary to ascertain what a *Sudka* is.

8. The author of the *Shuruh Vikaya* at page 292, line 3—(see Lucknow edition of Moonshy Newal Kishore, printed in 1884), says, "Gifts is the making another proprietor of the (*Ayn* or) substance, without consideration," (الهبة تمليك عين بلا عوض) The same author says at page 295, line 12, (والفرق بينهما ان الرجوع لا يصح في الصدقة لانه وصل اليه العوض وهو الثواب) "And the difference between them (that is, *Hiba* and *Sudka*) is that revocation is not valid in *Sudka*, because the giver of the *Sudka* has received consideration, and that consideration is *Suwab* (or religious merit)."

So also the *Hedaya*, Arabic edition, Volume III, page 699, line 3, printed at Calcutta in 1841), says—

(و لا رجوع في الصدقة لان المقصود هو الثواب و قد حصل و كذلك اذا صدق على غني استحسانا لانه قد يقصد بالصدقة على الغني الثواب و قد حصل و كذا اذا وهب لفقير لان المقصود هو الثواب و قد حصل)

"And there is no revocation (or retractation) in *Sudka*, because the object is *Suwab* (or religious merit), and that has been attained: so also (there is no revocation), if a man makes *Sudka* on the rich, reasoning by way of *Istehsan* (or analogy), because the object of making *Sudka* on the rich is *Suwab*, and the *Suwab* has been attained: so also

there is no revocation if a person makes *hiba* on a poor man, because the object is *Suwab*, and that *Suwab* has been attained.

The same passage has been translated by Hamilton at page 310, Volume III. of his translation of the *Hedaya* thus:—" Retractation of alms is not lawful, because the object in alms is *merit in the sight of God*, and that has been obtained. If also a person bestow alms upon a rich man, it is not lawful to retract therefrom, on a favourable construction of the law, because to acquire merit in the sight of God may sometimes be the object in bestowing alms upon the rich. In the same manner also, if a person make a gift of anything to a poor, it is not lawful to retract it, because the object in such gift is merit, and that has been obtained."

The *Kifaya*, which is a commentary on the *Hedaya*, and which is printed at foot on the same page of the *Hedaya*, whilst commenting on the passage of the *Hedaya* dealing with the *Sudka* on the rich, says, that *Sudka* on the rich also becomes *Koorbut* (or nearness, that is, *Suwab*) for which the giver becomes entitled to *Suwab*, because the rich, though possessing property of the value of a *Nisab* (otherwise he would not be classed as Ghuny or rich) might have a large family to support, and people make *Sudka* on such like, in order to get *Suwab*

(ثم التصدق على الغني قد يكون قربةً يستحق بها الثواب فقد يكون غنياً يملك نصاباً و له عيال كثير والناس يتصدقون على مثل هذا لنيل الثواب)

The author of the *Aynee* (at page 619, line 8, Volume III, edition printed at Lucknow by Moonshy Newal Kishore), whilst commenting on the passage in the *Hedaya* dealing with *Sudka*, lays down the same principles: he says—

(و لا رجوع فى الصدقة لان المقصود هو الثواب و قد حصل اي المقصود فصارت كهبة عوض منه)

"And there is no retractation in *Sudka*, because the object is *Suwab*, and that object has been obtained: therefore *Sudka* becomes like gift in which consideration has passed (that is, *hiba-bil-aiwuz*)." Then follows a discussion in which the author shews that although the *Suwab* is to be obtained in the world to come, by the mere favour of God, who is all powerful, and might not be favourably inclined, still the promise of God that there will be such a *Suwab* is sufficient consideration without the present certainty that the *Suwab* shall be realized in future: what is certain is that God has made the promise and the Koran is the authority for the proposition that the pormise of God is sure to be

realized (for God has said ان الله لا يخلف الميعاد "Verily never does God break his promise").

9. God says in the Koran in the 3rd Chapter in the Soorai Bukur as regards *Sudka*:—

مثل الذين ينفقون اموالهم في سبيل الله كمثل حبة انبتت سبع سنابل
في كل سنبلة مائة حبة و الله يضاعف لمن يشاء و الله واسع عليم *

"Those who give away their property in the way of God are like those who sow a seed which grows into a tree with seven branches, so that in each branch there are one hundred grains: and God doubles even this in whosoever's favor He wishes, and God is generous and knowing."

10. *Sudka* being thus based on the promise of God's favour in the world hereafter, and the motive of *Sudka* being religious merit, the object of *Sudka* might be the rich as well as the poor, as shewn in paragraph 8. And in this connection it must be borne in mind that there is an institution amongst the Mahomedans which is called the *Zakat*, and in which the rich cannot participate, and which is exclusively for the poor. *Zakat* is the poor rate, and it is one of the four things which are obligatory on a Mahomedan on pain of penalty hereafter. Those four things being *Numaz* or prayer; *Roza* or fasting; *Huj* or pilgrimage to Mecca; and *Zukat* or a poor rate on property. For the rules of *Zukat* see Sell's Faith of Islam (Pages 34 and 35 *ante*, Appendix VI). It follows from this that a man's own near relations and also the man himself could very well be the object of *Sudka*, and conclusive authority on this point will be found when the direct texts on Wakf will be dealt with.

11. It must also be remembered that, according to Mahomedan Law, *Sudka* is not obligatory or *Wajib*, but it is *Tuburroa* or *Moostuhub*, that is, an act though optional but commendable as contradistinguished from *Zakat* or poor rate which is obligatory.

12. According to the Mahomedan Law a person is free to make whatever disposition he likes, and the power to dispose of property is controlled only by reference to a circumstance which does not affect the validity of an ordinary Wakf made in health, *viz.*, by the time, in relation to death, when that power is exercised. If the disposition is made dependent on death, then, inasmuch as the right of heirs accrues on that event, the disposition is not valid except as to a third of the property; so also if the disposition is made at the time when the last moment has arrived, it cannot exceed a third; because the earliest moment when the right of heirs comes into operation is the last moment of a person's life when all hopes of life are gone.

13. It follows, therefore, that, when a man is in health, he is able to make whatever disposition he thinks proper in respect of his property, and no consideration, either relating to his heirs or to any other matter, can control his freedom of action, or avoid his act of disposition, whether it be a sale, or a gift, or a Wakf involving perpetuity, provided such disposition is otherwise in conformity with the rules and conditions laid down in that behalf by the Mahomedan Law.

14. I do not stop here to consider the case of indebtedness of the intending Wakf-maker. The Mahomedan Law does not allow any of its institutions to be prostituted for the vile purpose of converting it into a means of defrauding creditors; though it is remarkable that in all cases of debts it is the Hindoo who is the creditor and who, in all probability, knew full well that he was advancing money knowingly on a doubtful title. If the Wakf is made with the intention of defrauding creditors, there is no *Suwab* and no *Sudka;* consequently there is nothing in the Mahomedan Law to legalise such Wakf. The Futawai Alumgeeree, as translated in 4 B.L.R., A. C., 90, says as follows:—

"If a man mortgages land, and then makes an endowment of it previous to redemption of the mortgage, the endowment shall be binding, and this shall not cancel the mortgage. If the land, after remaining some years (not two years, as translated by Baillie, page 555 of his Digest) in the hands of the mortgagee, the mortgage be redeemed, it shall revert to the purpose to which it was appropriated. Should he, previous to the redemption, die, and leave sufficient assets with which to redeem the land, the redemption shall be effected, and the endowment shall be rendered effectual; but should he not leave sufficient assets, the land will be sold, and the endowment shall be rendered void."

Again Baillie in his Digest at page 555, says as follows:—"It is a further condition that the party making the appropriation is not under inhibition at the time either for facility of disposition or debt."

15. It will be noticed that in regard to Wills, that institution, like the institution of Wakf, has its origin in matters of religious belief, and the law regarding that institution likewise is extracted from the traditions of the prophet of like nature with the traditions bearing on the law of Wakf. The reasons assigned for the institution are stated in Hamilton's *Hedaya*, Volume IV, page 467. "Wills are lawful on a favourable construction. Analogy would suggest that they are unlawful; because a bequest signifies an endowment with a thing in a way which occasions such endowment to be referred to a time when the property has become void in the proprietor (the testator); and as an endowment with reference to a future period (as if a person were to say to another,

'I constitute you proprietor of this article *on the morrow*') is unlawful, supposing even the donor's property in the article still continues to exist at that time, it follows that the suspension of the deed to a period when the property is null and void (as at the decease of the party) is unlawful *à fortiori*. The reasons, however, for a more favourable construction in this particular are twofold. First, there is an indispensable necessity that men should have the power of making bequests; for man, from the delusion of his hopes, is improvident and deficient in practice; but when sickness invades him, he becomes alarmed and afraid of death. At that period therefore he stands in need of compensating for his deficiencies by means of his property, and this in such a manner that if he should die of that illness, his objects (namely, to compensate for his deficiencies and merits in a future state) may be obtained; or, on the other hand, if he should recover, that he may apply the said property to his wants; and as these objects are attainable by giving a legal validity to Wills, they are therefore ordained to be lawful. Secondly, Wills are declared to be lawful in the Koran and the traditions; and all our doctors moreover have concurred in this opinion."

Again the author of the *Hedaya* (see Arabic Edition, Volume IV, page 1,429, and Hamilton, Volume IV, page 469) cites the tradition reported by *Saad*, son of Vikkas by way of authority to restrict Wills within a third share of the property. "In the year of the conquest of Mecca, being taken so extremely ill that my life was despaired of, the prophet of God came to pay me a visit of consolation. I told him that by the blessing of God having a great estate, but no heirs except one daughter, I wished to know 'if I might dispose of it all by will.' He replied, 'No'; and when I severally interrogated him 'if I might leave two-thirds or one-half,' he also replied in the negative; but when I asked if I might leave a third, he answered 'Yes, you may leave a third of your property by Will; but a third part to be disposed of by Will is a great portion: and it is better you should leave your heirs rich than in a state of poverty, which might oblige them to beg of others.'"

The author of the *Hedaya* then in the passage which follows the above quotation shews at what time the right of heirs comes to be connected with the property of the owner:—"Besides, the right of the testator's heirs is connected with his property; for when he is in his last illness, he has no further use for it; and as this is the cause of the title to it becoming null and void in him and vesting in the heirs, their right, therefore, at that period becomes connected with it accordingly." So that even if during health the testator directs that more than a third go to the legatees, the bequest in excess of the third will be

invalid for the very reason for which such bequests would be invalid when made during his last moments.

The reason for the lawfulness of the bequest to the extent of a third is supported in the *Hedaya*, as already submitted, in this very paragraph by the Koran and the traditions of the Prophet in the passage,—"Secondly,—Wills are declared to be lawful in the Koran and the traditions"; but the tradition though not set out by Hamilton is set out in the original Arabic, and it is this—

(و هو قول النبي عليه السلام ان الله تعالى تصدق عليكم بثلث اموالكم في آخر اعماركم زيادة لكم في اعمالكم تضعونها حيث شئتم او قال حيث احببتم)

"And that tradition is the saying of the prophet, on whom be peace—Verily has God given you power over a third of your property at the end of your age (that is, at the last moment) in order that you might (have the opportunity to) add to your good acts; so place that third wherever you desire (that is, do with it whatever you please) or wherever your heart desires." (See also *Aynee*, Volume IV, page 583). Baillie at page 613 (2nd edition) says,—"It is *proper* for a man to make a Will when there is no right against him on the part of Almighty God; but *it is an incumbent duty to do so* when there is such a right; as for instance, when he has omitted to pay his *Zakat* or poor rate, or to fast, or to perform the *Huj* or pilgrimage to Mecca; or to say the prescribed prayers."

The object of Wills must be one, the justness of which is measured by religious ideas, for Mr. Baillie in his Digest, at page 625, says it is laid down, "And it is lawful for a Moslem to make bequest to poor Christians, for that is no sin—in opposition to building a church for them, which is sinful, and he who assists in building churches for them is a sinner. Again at page 662, the validity of Wills of Zimmees (or infidels who are allowed to remain in a Musulman country on the payment of a Jezia) for other than secular purposes, is regulated by, among other considerations, the consideration whether the purpose is *Koorbut* or a means of approach to Almighty God both with them and with us, or with them only, or with us only, and so forth.

16. In matters of *Sudka* and *Wakf* there is not unoften confusion of ideas arising from the ambiguity involved in the word *object*, which, at one time, is used to indicate the persons for whose benefit the *Sudka* or the *Wakf* is made, and at another time is used to indicate the motive which prompts the *Sudka* or the *Wakf*: that motive is no doubt religious or charitable in the sense already explained, *viz.*, that the motive is to obtain religious merit or *Suwab*; but the religious merit is not unoften transferred from the motive to the object, and it is said

and wrongly said, that the object should be religious or charitable in the sense that it should be pious. The error in restricting *Wakfs* to religious or charitable objects arises from this confusion. It is owing to this misapprehension, that Mr. Hamilton, at page 334, in Volume II, explains "Wakf or appropriations" as "meaning always of a *pious* or *charitable nature*." This mistake has been corrected by Baillie in his Digest at page 557, note 3 (2nd edition), where he says—"Mr. Hamilton has unnecessarily restricted the legal meaning to appropriation of a pious or charitable nature (*Hedaya*, Volume II, note page 334), and he has been followed by Sir William Macnaghten who renders the words by 'endowments.' But it will be seen hereafter that the term is more comprehensive, and includes settlement on a person's self and children."

17. I lay very great stress on this difference between the motive of the Wakf and its object, and I submit that all false notions entertained in the matter of Wakf have their origin in this confusion, and have been fostered and perpetuated by this confusion. I say that the correct view is, that the motive which impels a person to make Wakf is that God should be pleased with him and shew His favour to him; this motive is religious, because the Mahomedan religion teaches him that a motive like this is a thing a Mahomedan should entertain and strive after. His religion teaches him that God's pleasure and favour are worth having; but being a Mahomedan, his idea of God's pleasure and favour is in accordance with ideas inculcated by his religion and drawn therefrom: he is not one who professes a natural religion, so that the motive should assume the form of something which would bring goo to him generally speaking and according to ideas of all religion: neither is he a freethinker to have no notion of a reward in the future; but he is a Mahomedan charged with the especial ideas of his religion in regard to what is good or bad: his motive must be in consonance with his especial training under the Mahomedan system. The next thing for him to do is to see how his motive is likely to be fulfilled and realized, and by what acts it is likely to be accomplished. Here again his religion furnishes him with principles how he is to realize his hopes and desires; and the answer to this question constitutes the object as distinguished from motive; and in the case of Wakf the object of the Wakf could be ascertained by answering the question by benefiting whom would he attain religious bliss: those persons are the object of the Wakf: in order to see what objects would fulfil the motive, you must go to the principles of faith and religion, because here you are dealing with a Mahomedan case; a Mahomedan is seeking religious reward; he must be guided by the Mahomedan Theology; he must

not be guided by universal morality, which is as variable as social matters, but he must go to his religion in quest of the object: he must not be guided by an argument like this:—feeding even infidels is naturally a moral act, and is therefore good; this is no argument to him: what satisfies him is this, my religion tells me by feeding even infidels I will get religious merit: he accordingly says in his Wakf that the poor amongst the infidels are not to be excluded from being the object of my Wakf. Therefore it is religion which would enable you to find out what class of persons come within the object of a Wakf, whether relatives or strangers; if the latter, whether rich or poor, and so forth: you cannot have a measure of your own to ascertain the objects of a Mahomedan Wakf calculated to fulfil the motive; for instance, you cannot say because the property belongs to a Mahomedan, therefore, the poor Zimmees or infidels are outside the object; so also you cannot say *à priori* that the poor alone shall fulfil the object to the exclusion of the rich, or that the object should be confined to strangers, to the exclusion of relatives: in short, for the purpose of ascertaining what class falls within the object of a Wakf so as to fulfil the motive of a Mahomedan to obtain religious merit, rules of universal morality based on equitable considerations are wholly foreign to it, and recourse must be had to the Mahomedan Law to find out whether religious merit is obtained by relieving the rich or poor, strangers or relatives, infidels or believers, and so forth. (See para. 58, page 57.)

18. Mr. Hamilton's translation is, in some instance, incorrect, and in most instances misleading, so that it is not at all surprising, if the correct nature of the doctrine of Wakf is not rightly apprehended from his translations. Whilst giving Aboo Huneefa's definition of Wakf, he says in Volume II, at page 334—"It signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue, and the advantage of it go to *some charitable purpose* in the manner of a loan." The correct translation is that "it is the detention (*hubs*) of the substance (*ayn*) of a thing, upon the ownership of the Wakf (or appropriator), and the giving in *Sudka* of the profits by way of a loan"; and it will thus be seen that the word *Sudka* is used in the original in this place, and Mr. Hamilton having already translated Wakf as disposition of a pious or charitable nature, he renders *Sudka* also in the same sense: but he has been corrected by a higher authority than myself, *viz.*, by Mr. Baillie, as already set forth in paragraph 16, page 48 *ante*.

19. In order to form an accurate notion of the law of Wakf, you must find out in what matters the Mahomedan Lawyers are agreed and wherein they differ. From the residuum of agreement after

eliminating the points of disagreement you can arrive at a fairly correct conclusion what a Mahomedan Wakf is. Wakf, according to its literal meaning, signifies (*hubs* or) detention (see Hamilton, Volume II, page 334, line 1), and the instance of its use given in the original *Hedaya* is, "I have detained the animal" (see Arabic *Hedaya*, Volume II, page 887, line 4), and the very word Wakf involves perpetuity. (See *Shuruh Vikaya*, page 269). As regards the object of the Wakf, *viz.*, the person who might be declared to take benefit under it, there is no difference whatever amongst Aboo Huneefa and his two disciples, except on such points as arose from their respective views regarding the nature of the Wakf itself as an institution. All three were pure Mahomedans, having no difference whatsoever in matters of religion or of ritual: all had the same notions and convictions regarding religious merit, and the way by which it could be accomplished and earned. All are agreed upon this limitation that the object should be such that the profits applied on that object should be capable of bringing good in the world to come, there being no difference likewise in regard to the nature and character of that object; that limitation was one upon the nature and extent of which everybody was agreed; and in addition to this general limitation there is something peculiar according to individual view: but taking the general and particular limitation as a whole, you have the law of Wakf, and you must elect to give effect to a particular Mujtahid, accordingly as the views of that particular Mujtahid have been accepted and received as the governing law of Wakfs as shewn from practice and authority. It is not open to the courts, whilst professing to administer the law as laid down by the Mahomedan Lawyers, to introduce a new element of divergence where all lawyers are agreed, and where there is no dissentient voice, and to introduce a new limitation where there is no limitation at all according to any single school, doctor, or text-writer.

20. Thus the *Kifaya*, Volume II, at page 888, says that, according to Aboo Huneefa, Wakf "is the detaining of the substance (*Ayn*) upon the ownership of the Wakif, and the making *Sudka* of the profits upon the poor (*fakeers*) or *upon any of the many ways of Khyr* (or good in the world to come) by way of a loan."

21. It is an error to suppose that, according to Aboo Huneefa, Wakfs are altogether illegal and invalid. The *Hedaya* guards against such a supposition at page 887 of the Arabic Edition, Volume II, line 6. (See Hamilton's Translation, Volume II, page 334, line 5.)

(ثم قيل المنفعة معدومة و التصدق بالمعـــدوم لايصح فلا يجوز الوقف اصلا عندهو و هو المأثور في الاصل و الا صح انه جائز عندهو الا انه غير لازم بمنزلة العارية

"Then it is said that profits are things which are non-existent, and the making *Sudka* of a non-existing thing is not valid; therefore Wakf is not at all permissible according to him, and this is so stated in the *Mubsoot*. But the correct view is that Wakf is permissible according to him, but that the same is not binding, in the same way as a loan." Here the reason for the alleged invalidity must be noted: the reason is not that Wakf is open to the objection of perpetuity, or that the purpose and object must be religious or charitable, but the reason refers to the objection which, according to Aboo Huneefa, applies generally to dispositions in which what is disposed of is not the substance of a thing but its produce or profits, as for instance an *Ijara* or lease of a garden.

22. The correct doctrine of Aboo Huneefa in the matter of Wakfa is that, if a person makes a *Wakf*, the ownership still subsists in the appropriator, and the Wakf does not become obligatory, but the profits are applied to the purposes and objects named, as in the case of a loan: and the consequence is that he can resume it, and after his death the property will descend to his heirs. The reasons which influenced him were these :—the prophet said "there is no (prevention or) detention (of property) from (the operation of the rules of) inheritance," and Shooraih reports that the prophet used to sell *Wakf* property. (See Arabic *Heyada*, Volume II, page 889; and Hamilton, Volume II, page 336).

Another reason which weighed with Aboo Huneefa is stated at page 890 of the Arabic *Hedaya*, Vol. II; but inasmuch as the translation of the passage by Hamilton is imperfect, I quote the passage and translate it. The passage is this—

جلد ثاني صفحه ٨٩٠ و لان الملك باق فيه بدليل انه يجوز الانتفاع به زراعةً و سكنًى و غير ذلك و الملك فيه للواقف الا ترى ان له ولاية التصرف فيه بصرف غلاته الى مصارفها و نصب القوّام فيها الا انه يتصدق بمنافعه قصار شبيه العارية و لانه يحتاج الى التصديق بالغلة دائما و لا تصدق منه الا بالبقاء على ملكـــه و لانه لا يمكن ان يزال ملكه لا الى مالك لانه غير مشروع مع بقائه كالسائبة بخلاف الاعتاق لانه اتلاف و بخلاف المسجد لانه جعل خالصا لله تعالى و لهذا لا يجوز الانتفاع به و ههنا لم ينقطع حق العبد عنه فلم يصر خالصا لله تعالى

"And because the ownership still subsists in it on the ground that it is allowable to derive benefit therefrom by way of cultivation and habitation, and other means, and the ownership (that so subsists) is for the Wakif (or appropriator); Dost thou not see that it is he who has the power of disposal in the same by applying the profits

to the uses of the Wakf and by appointing procurators for the same, except that such profits are made *Sudka* of (instead of being applied to private use) and thus (the Wakf) becomes analogous to a loan; and on the ground that the necessity which the Wakif is under, consists in making *Sudka* of the profits permanently, and there can be no *Sudka* of the profits unless (on the assumption that) the same continues in his ownership; and on the ground that it is not possible that his (the appropriator's) ownership should cease without the ownership being vested in (another) owner, because it is not lawful that the ownership of the owner should cease without its being vested in somebody else, whilst the subject-matter is still in existence, as in the case of *Sayibah* (which is not lawful as explained in para. 24, page 51); although such a thing is possible in the case of manumission, because the same (that is, manumission) consists of relinquishment of one's right; and in the case of a mosque, because the same is rendered purely to God, and for this reason it is not allowable to derive benefit from the same. But in the case of Wakf, the right of man is not extinguished in the property, and it is not, therefore, purely for the sake of God."

23. The *Kifaya*, Volume II, at page 870, thus explains the same passages of the *Hedaya*—

قوله و لان الملك باق فيه يعني دل الدليل على بقاء الملك فيه و هو جواز الانتفاع به زراعة و سكنى و غير ذلك كما ينتفع بالمملوكات و ما للعباد فيه نفع لا يصلح لله تعالى لان ما لله تعالى يجب ان يكون بوصف الخلوص كالمسجد لما صار لله تعالى لا ينتفع بشيء من منافع الملك و ان كان يصلح لها و اذا ظهر ان الملك فيه باق وجب ان يبقى على ملكه ضرورة و لهذا بقي دابه و تدبيره بعده في نصب القيم و توزيع الغلـــة و اعتبر شرائطه و لو خرج عن ملكه لما صح شرطه في لغلة كما لو اعتق عبده بشرط ان يصرف غلة الى كذا او جعل ارضه مسجدا بشرط ان يصلي فيه فلان دون فلان ومرويهما محمول على وقف المضاف الى ما بعد الموت *

"The expression 'and because the ownership still subsists in it,' that is, reason points to the conclusion that the ownership should subsist in it (*i.e.*, in the Wakf property); and that reason is that it is allowable to derive benefit from it by means of cultivation, habitation and by other means, just in the same way as benefit is derived from things of which there is an owner; and whatever property is such that man can derive profit from it, the same is not such that it can be owned by God; because whatever is for God, it is necessary that the same should be in the quality of being purely for God, as a mosque; from which, when it becomes for God, no benefit can be derived out of the profits

of ownership, although the property might be capable of yielding profits. And when it is clear that the ownership remains in the property (that is, when it is clear that somebody must be the owner) it follows out of sheer necessity that the property should remain in the ownership of the Wakif (himself): and it is for this reason that the rules laid down by the Wakif and the mode pointed out by him, after he has made a Wakf, in the matter of appointing procurator and applying the proceeds, exist to be enforced, and the conditions laid down by him must be observed: and if the property should go out of his ownership, how should the conditions laid down by him in regard to the application of proceeds be valid; just as when a person emancipates his slave with a condition that he should apply the profits (of his labours) to such and such an object; or if a man constitutes his land a mosque with a condition that so and so shall say his prayers therein and not so and so: and (according to Aboo Huneefa) what is reported from the two disciples is referable to such a Wakf as relates to a time after death."

24. The substance of the argument of Aboo Huneefa is this:—It is only when a thing has an owner that advantage can be derived from it by way of cultivation and other means; and when a thing has no owner, no profit can be derived from it; for instance, when a slave is emancipated, and when nobody is his owner, you can derive no benefit from his labours: and for instance a mosque; nobody is the owner of the mosque, and therefore profits arising therefrom cannot be appropriated to the use of man; but in cases of Wakf the profits must be applied to the use of man; therefore property from which some profit is derived by mankind cannot be left unowned, and somebody must be its owner. Then if somebody must be the owner, it is the Wakif himself who is that somebody and is the owner, and who has the power to direct how the proceeds shall be applied, and has also authority in the matter of the appointment of the Mootwally. The *Sudka*, therefore, takes place of the profits in the way of a loan. Further, that the very object of Wakf is that there should be *Sudka* of the profits, not for a limited time but permanently, and how is such *Sudka* of the profits possible unless the ownership subsists in the Wakif at the same time. That is to say, if a man makes a *Sudka* of the *Ayn*, or substance of his property, the property itself and the profits are all made *Sudka* of; but if he retains the *Ayn* or substance, and says I make *Sudka* of the profits for one year, that is valid so far, and there is a *Sudka* of the profits, and his ownership of the *Ayn* continues; so also if he says I make *Sudka* of the profits permanently, his ownership in the *Ayn* must continue in order that the *Sudka* of the profits should take effect. And because to make Wakf involves permanent *Sudka* of the profits,

therefore, in order that Wakf might be valid, and in order that the proceeds might be applied as directed, the ownership must continue to subsist in the Wakif. Further, that it is not possible to suppose that a thing should continue to exist, and at the same time ownership should cease in a person, without somebody else becoming its owner; such a supposition is unlawful; just as in the case of a *Sayiba*, where the camel existed and was alive, and the owner gave up his ownership, and believed nobody else became its owner (and that God became its owner, such belief being unfounded in law) see para. 22, page 50. But says Aboo Huneefa, no objection could be raised against his view from the case of manumission of a slave, in which case it might be urged that the master's ownership ceases without anybody else becoming the owner; because the primary state of man is freedom or a state of unownership, and it is only by accidental causes that he comes to be owned by his fellow-being: the relinquishment of the right of ownership in the case of a slave therefore is his restoration to the original state, and this analogy cannot therefore apply to things of which there must be an owner. So also the case of a mosque (says he) could not be cited against his view, because in the case of a mosque the object is not to benefit man, and therefore it is possible to imagine that there should be no human ownership of it; but in the case of Wakf, the very object is to benefit human beings; therefore the case of a mosque is not a parallel case.

25. Aboo Huneefa having, therefore, held Wakf after it has been made, to be, for reasons stated above, not *Lazim* or obligatory in itself, he held, seeing that this is a matter in which the two disciples take a contrary view, that the case being one in which the *Moojtahids* disagree, if the *Kazy* declares in favour of the Wakf, it becomes *Lazim* and obligatory, and then the property ceases to remain in the ownership of the Wakif but would vest in God. Therefore the only difference between Aboo Huneefa and Aboo Yusoof is that, according to the former, a decree of the *Kazy* is necessary, whereas no such decree is necessary according to the latter. Anyhow, the difference between their views ceases after the necessary form is gone through to make the Wakf obligatory. What then is the view of Aboo Huneefa after a Wakf has become obligatory, and after such form has been gone through. The answer is, his view is not in any essential particular very different from that of Aboo Yusoof.

26. Aboo Huneefa agrees with Aboo Yusoof as also with Mahomed on the following points:—The motive or desire which prompts a man to make Wakf is the same *Suwab* according to all as being part of religion which is common to all, and the object to which the property

must be devoted is the same according to all as flowing from a common religion.

27. Every one of the objections of Aboo Huneefa has been refuted and set at rest by the two disciples.

28. As regards the first objection of Aboo Huneefa, the *Kefaya*, Volume II, at page 889, says as follows :—

كفايه جلد ثاني و له قوله عليه السلام لا حبس عن فرائض الله تعالى اي لا مال يحبس بعد موت المالك عن القسمة بين الورثة و فرائض الله تعالى انصباء الورثة كما قال الله تعالى فريضة من الله قال الشيخ الامام المعروف بخواهر زاده رحمه الله تعالى و الامام البزعري رحمه الله استدلال بهذا الحديث ليس بقوي لانه انما يستقيم هذا اذا كان حق الورثة تعلق بماله فاما اذا كان قبل التعلق فليس كذلك الا ترى انه لو تصدق في صحته صدقة منفذة او وهب فانه لا يجري فيه الارث و لم يكن ذلك حبسا عن ذلك الا ان يقال ملكه لم يزل عن الموقوف بدليل انه يعتبر شرائطه في صرف الغلة و لو زال ملكة عن الرقبه لما اعتبر شرطه في التي هي تابعة للرقبة و الرقبة قد زالت عن ملكه فعلى هذا يكون حبسا عن فرائض الله تعالى

"And Aboo Huneefa relies on the saying of the prophet 'there is no detention from (the operation of the rules of) inheritance; that is to say, there is no property which, after the death of the owner, could be detained from being partitioned amongst the heirs; and the inheritance ordained by God are portions for the heirs, as God says 'inheritance is fixed (or provided for by God).' Sheikh-ool-Imam known as Khaharzada, on whom be peace, and Imam Buzazy, on whom be peace, say, reliance on this tradition has no force, because the argument is only right when the right of heirs becomes connected with the property of the owner (see para. 12 of this Appendix, page 46); but when a disposition is made before such right has become so connected, then there is no force in the argument; dost thou not see that when a man makes *Sudka* whilst he is in health by way of *Sudka-i-Moonfaza* (or a *Sudka* which is to take effect immediately) or makes a gift, there the right of inheritance has no effect, and this does not constitute detention of a thing from the operation of the rules of inheritance: except when (on the view, *viz.*) it is said that the ownership of the proprietor does not abate from the property made Wakf, on the ground that the conditions laid down by him are regarded in the disposal of the proceeds; and if his ownership were to cease from the substance of the thing, how could regard be had to conditions relating to what follows (or flows from) the substance, the ownership (it being assumed) has abated (from the

substance); according to this view (only) could it be said that to make Wakf is to retain a thing from the operation of the rules of inheritance."

29. As regards the argument of Aboo Huneefa that the prophet sold Wakf properties, the *Kefaya*, Volume II, at page 890 says as follows:—

كفايه جلد ثاني و عن شريح رحمة الله جاء محمد عليه السلام يبيع الحبس فهذا بيان ان لزوم الوقف كان في شريعة من قبلنا و ان شريعتنا ناسخة لذلك

"And it is reported from Shooraih, on whom be peace, that Mahomed (the prophet), on whom be peace, came and sold Wakf (or detained) property (see para. 64 (f), page 60): this is a statement that Wakf was obligatory under the prophets before ours, and that under our prophet those were set aside (that is to say, those Wakfs which existed for idolatrous purposes in times of ignorance and idolatry were set aside by the advent of the true prophet)."

30. *The Inaya*, Volume II, at page 670, whilst commenting on a passage of the *Hedaya*, Volume II, at page 892, thus expresses himself as regards the second objection of Aboo Huneefa, namely, that the Wakf property does not get out of the ownership of the Wakif; because if it did, how could the Wakif have the power to appropriate the profits to the particular objects in view, and how could the conditions regarding the disposal of the profits be valid:—

عنايه جلد ثاني و الجواب عن الثاني - بان خروج الملك الى الله تعالى قربة لا يمنع التصرف فيه ممن خرج عنه الا يرى ان القربان يصير بالاراقة لله تعالى ثم ان صاحبه يتصرف فيه بالاكل و الاطعام و التصدق به بقولية الشرع لكونه المتقرب به فجاز ان يكون امر الواقف كذلك

"The answer to the second objection is this: the divesting of ownership in favour of God is *Koorbat* (or religious merit or *Suwab*), which does not prevent acts of disposition on behalf of him who has relinquished possession. It is not seen that *Kirban* (or religious observance) is attained by making the blood flow for the sake of God (referring to the sacrifice at the *Bakreed* festival), and that the owner of the cattle sacrificed performs acts of disposal in regard to the same by eating of the sacrifice and by making others partake of it, and by making *Sudka* of the same, and he performs such acts because the *Shera* authorises him to do so by reason of those acts being such that *Tukurroob* (or *Suwab*) is obtained thereby. Therefore it is fit that the matter of Wakf should also be similar to this."

31. Aboo Huneefa's view that Wakf is not obligatory has never been recognised either during his time or after him; and that view has

been commented on in rather strong language as not being based either on authority, reason or analogy. It is not necessary to reproduce the terms of condemnation, but they are set forth in detail in the *Kafaya*, Volume II, at page 890.

32. The two disciples are not simply satisfied by controverting the view of Aboo Huneefa, but they support their view against that of Aboo Huneefa by reference to authority, analogy and reason. The authority cited by them is to be found at page 888 of the Arabic *Hedaya*, Volume II, and at page 335 of Hamilton's translation Volume II, and consists of the direction of the prophet to Oomur to make Wakf of the land called *Sumgh*. How Oomur made Wakf of the land is not set forth in the *Hedaya*, but the *Kefaya*, at page 888, Volume II, says as follows :—

كفاية جلد ثاني فتصدق به عمر رضي الله عنه في سبيل الله تعالى و في الرقاب و الضيف و المساكين و ابن السبيل و لذى القربى منه

"Then Oomur made *Sudka* of it in the way of God, and on *Rekab* (that is, to emancipate slaves) and on guests, and on the poor, and on the travellers, and for the kindred."

33. Another argument in favour of the Wakf being obligatory, stated at the same page in the *Hedaya*, is this, 'and necessity requires that a Wakf should be obligatory in order that the Wakif might receive *Suwab* (or religious merit), perpetually ; and this necessity is answered only by his relinquishing his ownership and vesting the same in God.

(و لان الحاجة ماسة الى ان يلزم الوقف منه ليصل ثوابه اليه على الدوام و قد امكن دفع حاجته باسقاط الملك و جعله الله تعالى)

34. The *Kefaya*, at page 889, Volume II, also refers to the Wakf of the prophet himself of *Huwaib* or garden, to Abraham's Wakf, which exsits up to the present day, and to the Wakf by the *Ashabs* in Mecca and Medina.

35. As regards the authorities consisting of the traditions of the Prophet cited in the aforesaid paragraphs, in support of the view of Aboo Yusoof, I most humbly beg to be allowed to observe that it is the duty of the *Mujtahid* or Imam to see the relevancy of the authority and its force as bearing on the question of Wakf, and also to see whether a particular doctrine such as the doctrine of Wakf is capable of being extracted from such authority. It is not the duty of the *Mookullids* or followers to see whether a particular conclusion is correctly and logically drawn by the *Mujtahids* from the authorities, whether such authorities consist of the text of the Koran or of the texts of the Tradition. In Sell's Faith of Islam (See *ante* page 27) it is shown how vast should be the extent of a *Mujtahid's* knowledge and information, and how

complicated the rules of the Principles of Jurisprudence or *Ilm-i-Oosool* are, all of which the *Mujtahid* should have at his fingers' end. What is set forth in Sell's Book as relating to Jurisprudence is to the whole of the science of Jurisprudence as it is treated in recognized text-books such as the *Moosullum-ool-Suboot*, as a drop of water is to the ocean. If individuals were to be at liberty to see for themselves whether the reasoning of the *Mujtahid* or Imam is correct, then the result would be disastrous, and every individual would be a law unto himself. Freedom of thought is disallowed by law under certain circumstances. If freedom of thought were to be allowed absolutely, it would be difficult to define the point where such freedom is to stop. People with indifferent knowledge and scanty information might think themselves qualified and competent to form an opinion on questions on which the Imams with their life-long labour have hesitated, and they might arrive at results conflicting with each other and conflicting with the results of the *Mujtahid*. This would introduce *chaos* and disorder, and would produce a revolution affecting society in its social, religious and political aspects. People would be found having different sets of conscience legalized by law; such a state of things is at no time desirable. The Government has enacted no special statute laying down particular rules which the people are to follow in the matter of Wakfs. On the other hand Government has provided in a general way by its enactment that the Mahomedan Law should apply. A careful enquiry leads to the conclusion that what Aboo Yusoof has laid down in the matter of Wakf is the true Mahomedan Law according to all the Text-Writers. Therefore in effect the Government enactment lays down that Aboo Yusoof's view must be followed. When Aboo Yusoof's view is not held to be the Mahomedan Law by the Privy Council on the question of Wakf, in what an embarassing position are the subjects placed. They are bound in conscience by one Rule but a wholly different Rule is made binding on their acts and conduct.

36. Then as regards the difference between Mahomed and Aboo Yusoof, the first point wherein they differ is, whether the object or purpose of the Wakf should be perpetual. Mahomed says that the object mentioned should involve perpetuity, *and in this he is supported by Aboo Huneefa*. See Hamilton, Volume II, page 341. The reason assigned by Mahomed and Aboo Huneefa is not very happily rendered by Hamilton; it is this :—

هداية جلد ثاني صفحه ٨٩٥ لهما ان موجب الوقف زوال الملـــك بدون التمليك و انه يتابد كالعتق فاذا كانت الجهة يتوهم انقطاعها لا يتوفر عليه مقتضاه فلهذا كان التوقيت مبطلا له كالتوقيت في البيع

Arabic *Hedaya*, Volume II, page 895. "Their argument is that the necessary requirement in a Wakf is the extinction of ownership without the creation of ownership (in any person) and that such extinction of ownership is perpetual as in the case of manumission. Therefore if the object is such that it is possible to imagine its termination, then the necessary requirement of Wakf is not carried to perfection. It is for this reason that limit of time renders a Wakf void as limit of time does in a sale."

37. It will thus appear that Aboo Huneefa found a difficulty only at the beginning; but after a Wakf has once been established and after it has become obligatory, no further difficulty remains, according to Aboo Huneefa; and in that case he agrees with one or other of the two disciples.

38. Aboo Yusoof holds that Wakf is valid even when the avowed object is one that might fail, the only effect of the omission to state a perpetual object being that after the specified object has failed, the proceeds of the Wakf shall be applied to the poor who belong to a class that never fails. His reason is stated at page 891 of the Arabic *Hedaya*, Volume II, and page 342 of Hamilton's translation, Volume II; but the translation by Hamilton being somewhat misleading, I will give my own translation :—

هداية جلد ثاني صفحه ٨٩٥ و لابي يوسف رحمه الله ان المقصود هو القرب الى الله تعالى و هو موفر عليه لان القرب تارة يكون في الصرف الى جهة تنقطع و مرة بالصرف الى جهة تتأبد فتصح في الوجهين و قيل ان التابيد شرط بالاجماع الا ان عند ابي يوسف رحمه الله لا يشترط ذكر التابيد لان لفظة الوقف و الصدقة منبئة عنه

"The motive (or the thing intended to be gained) by making a Wakf is *Koorbat* (or *Suwab*, translated by Hamilton, as an act of piety acceptable to God) to God; and that is secured to him; because *Koorbat* (or *Suwab*) is sometimes gained by applying the proceeds towards objects which might come to an end, and at other times by applying them towards objects which are of permanent character: Wakf, therefore, is valid in both cases. And it is said by some that perpetuity is a condition (for the validity of a Wakf) according to *Ijma* (or the concurrence of the learned doctors and divines); but, according to Aboo Yusoof, it is not a condition that a perpetual object should be specified; because the word Wakf and *Sudka* indicate perpetuity."

39. The same subject is noticed at page 255 of Volume II of the *Shuruh Vekayah* and *Chulupy*, published at Calcutta on the 13th July, 1877, except that an instance is given of a valid Wakf according to the

view of Aboo Huneefa and Mohamed on the one hand, and Aboo Yusoof on the other, in these words :—

چلپي مطبوى مع شرح وقايه در كلكته * لا يتم الوقف عند الاعظم و الرباني رحمهما الله تعالى حتى يجعل آخره بجهة لا ينقطع مثل ان يقول على كذا و كذا ثم على فقراء المسلمين حيثما و جدوا مثلا و قال الثاني رح اذا سمى جهة تنقطع مثل ان يقف على اولاده اوعلى امهات اولاده جاز و صار بعدهما للفقراء وان لم يسمهم

"Wakf does not become complete according to Azum (or Aboo Huneefa) and Rubbany (or Mohamed) until the end of it is rendered towards an object that cannot terminate ; as for instance, when the man says, 'on so and so and so and so, and thereafter on the poor Moslems wherever they might be found;' and Sany (or Aboo Yusoof) says, when the Wakif specifies a thing which may terminate, the Wakf is (even then) valid *as when he makes Wakf on his children or on his Oomm-i-Walad.*"

40. It will thus be seen that, according to Aboo Yusoof, as well as according to Aboo Huneefa and Mohamed, the object and purpose of the Wakf for which proceeds are to be applied is to be ascertained by reference to the principle of *Suwab.* To that principle, Aboo Huneefa and Mohamed add another, *viz.*, express mention of a perpetual object, because perpetuity is involved in the idea of Wakf and is essential to it : to that principle, Aboo Yusoof, for the same reason, does not add the express mention of a perpetual object; that is, because perpetuity is involved in the idea of Wakf and is essential to it, therefore a mention of it is redundant. It also follows both from the general views entertained by all the three Imams, as well as by the express illustration given in paragraph 39, page 53, that if a person makes a Wakf on his children and descendants as long as any descendant can be found, and on their failure on the poor Moslems wherever they may be found, then this is a good and valid Wakf, and there is not the least possible doubt as to its validity. The ruling therefore in I.L.R., 13 Madras Series, page 66, that Aboo Huneefa maintained that to constitute Wakf there must be a dedication solely to the ownership of God or to religious or charitable purposes, is wholly based on misconception of the objects of Wakf not only according to Aboo Huneefa but his two disciples. The ruling in 10 Bombay High Court Reports, page 7, is also incorrect; inasmuch as it is ruled there that the balance of authority is that to constitute a valid Wakf the dedication must be *solely* to charitable purposes. The result is arrived at on a consideration of Hamilton's rendering of Wakf, which is said to mean *always* of a pious or charitable nature (see paragraph 16, page 48), and by reference to the

meaning of the term in certain dictionaries such as Johnson's Dictionary and Wilson's Glossary. Reference is also made to Macnaghten's Mohamedan Law and to Baillie's Note, which are said to be founded on Aboo Yusoof's view, and supported by a saying of the Prophet, "a man giving subsistence to himself giveth alms." And in I.L.R, 6 Cal. Series, page 744, this tradition is assumed to authorise the doctrine of settlements, but it is taken to apply, "as shewn by Hamilton, where the whole of the property is given in charity so as to reduce the man to poverty." Be it observed here that this tradition, which is to be found at page 351, of Hamilton's translation, of the *Hedaya*, Volume II, was not cited by Aboo Yusoof to validate Wakf on children, on which question there was no difference between him and Mahomed, or between him and Aboo Huneefa; but it was cited by him to validate Wakf on one's self, on which question there was a difference between Aboo Yusoof and Mahomed, as will be discussed further on.

41. Another point of difference between Aboo Yusoof and Mahomed has relation to the constitution of a Wakf. According to the former, it is constituted by the declaration of the owner without any further ceremony, as in the case of a sale: he says the case of a Wakf in this matter is similar to that of manumission, in which case freedom takes effect on the declaration being made. Se Arabic, *Hedaya*, Volume II, page 891, and Hamilton, Volume II, page 337. But according to Mahomed it is necessary that there should be surrender to the Mootwally. The reason assigned by Mahomed is this—

هدايه جلد ثاني لان حق الله تعالى انما يثبت فيه في ضمن التسليم الى العبد لان التمليك من الله تعالى و هو مالك الاشياء الا يتحقق مقصودا و قد يكون تبعا لغيره فياخذ حكمه فينزل منزلة الزكوة و الصدقة

"The reason of this is that the right of God is not established except under cover of surrender to His creature; because to make God the owner, God being already the owner of all things, cannot be done directly, but it can be done indirectly through (or by means of) some person: Therefore virtually the same result is obtained as by making God owner: therefore Wakf becomes similar to *Zakat* and *Sudka*."

42. It is unnecessary to observe that in this instance also Aboo Huneefa sides with Mahomed; because, according to the former, the way to obtain the Kazy's decree and make the Wakf binding is, that the Mootwally should lodge a complaint, and, therefore, surrender to the Mootwally must be necessary according to him.

43. Another point of difference between Aboo Yusoof and Mahomed is on the question whether Wakf can be made on one's self, and whether a man can appoint himself a Mootwally. Aboo Yusoof answers

the question in the affirmative, and Mahomed in the negative. The argument adduced by the latter is at page 902 of the Arabic *Hedaya*, Volume II, and page 349, line 30 of Hamilton's Translation Volume II. Mahomed reasoned in this way: he said Wakf is the making God the owner; therefore it is subversive of Wakf to make Wakf on one's self, or to make himself Mootwally; because that really amounts to creating ownership in one's self from one's self.

44. The reason assigned by Aboo Yusoof is to be found at page 903 of the Arabic *Hedaya*, Volume II, and page 350, line 13 of Hamilton's translation Volume II. Shortly stated his argument is this: that the prophet himself used to eat of his Wakf, and that Wakf is the destruction of ownership of self in favor of God for the purpose of obtainting *Koorbat* (or *Suwab*); therefore, when a man makes it a condition that a part or the whole of the profits shall go to himself, he stipulates so in regard to that which is in the ownership of God, and not in regard to what is in his own ownership; as for instance, if a man makes an inn, he might well stop in it, and if he makes a *Mukbura*, he might well be buried in it after his death; that the ultimate end in making Wakf is to obtain *Koorbat* (or *Suwab*), and this *Koorbat* is obtained by applying the proceeds towards his own use; the prophet said, "Maintenance of a man upon his own self is *Sudka*," or as Hamilton translates it, "a man giving a subsistence to himself is giving alms;" and that Wakf is a matter which should be rather encouraged than otherwise (see *Kefaya*, Volume II, page 901); see also *Shuruh Vikaya* and *Chulupy*, Volume II, page 271, where the same subject is more exhaustively discussed, and where it is stated that as regards the stipulation for Mootwallyship in favor of the Wakif such stipulation is valid by *Ijma*. According to Mahomed there must first be a surrender to a Mootwally and then the Mootwallyship shall be to him by an act of the Mootwally; but Aboo Yusuf says that the Mootwally derives his authority by an act of the Wakif, therefore it is impossible that he should himself possess no authority, but should be capable of vesting authority in others.

45. Aboo Huneefa probably sided with Mahomed in holding that a man cannot make Wakf on himself.

46. Therefore, in order to make out that a valid Wakf might be created on one's self, it is necessary to shew that the accepted view is that of Aboo Yusoof, and not that of Mahomed. As to this there is no difficulty; because every author who has dealt with the subject either in the form of *Oosool* or Jurisprudence, or in the form of *Fatawa* or decisions, has held that in the matter of Wakfs generally, Aboo Yusoof's view is the governing view, and not that of Aboo Huneefa or Mahomed.

The *Kefaya* at page 901 of Volume II says so, and the *Hedaya* also points to this rule by expounding Aboo Yusoof's view last of all. The Fath-ool Kadir also at page 834, Volume II, says as follows:—"Sudrool Shaheed and the Mashaikhs of Balkh hold that the Fatwa is according to the view of Aboo Yusoof and we also give Fatwa accordingly." So also the Shuruh Vekaya and Chulupy in Volume II, page 271, and Moofty-ool-Suklyn and Sudrool Shahed lay down that the Fatwa is according to the view of Aboo Yusoof in order that people might be encouraged to make Wakf. The reason assigned by Aboo Yusoof for his view being the tradition that the Prophet ate of his *Sudka*, which was made Wakf.

47. And in this matter also a mistake has crept into the translation of the *Hedaya* by Hamilton, for which, however, the latter is to a lesser degree responsible, there being an interpolation in the Persian rendering from which Hamilton made his translation. The interpolated passage is at page 337, line 24, Volume II, "and decrees are passed on this principle." The previous and subsequent passages run thus in the original Arabic *Hedaya*, Volume II, page 891, line 8, "And according to Mahomed, on whom be peace, it is necessary that there should be a surrender (of the Wakf property) to the Mootwally; because the right of God is only established in it, under (or by means of) the surrender (of the thing) to his creature: (here the interpolated passage occurs): because making God owner, God being (already) the owner of all things, could not be accomplished directly: but the same could verily be accomplished indirectly, by making it follow somebody else: therefore Wakf property partakes of the character of that to which it is made to follow (that is, it partakes of the character of being owned by God—the possession of the creature being in token of the possession of God): and therefore the Wakf property shall be viewed in the light of *Zakat* and *Sudka* (that is, as in *Zakat* and *Sudka*, the ownership of the poor man, to whom the *Zakat* and *Sudka* is given, is only established after the same has been surrendered, so also here)."

48. The translation from the Persian edition (page 492, Volume II), should run thus:—"And Mahomed, on whom be peace, has said that the same is not extinguished, until the Wakf appoints a Mootwally for it, and surrenders it to the Mootwally; *and the Fatwa is according to this;* and the reason of it is that the right of God is not established in the Wakf except under surrender to his creature; because making God the owner, God being the owner of all things, is not established directly (that is, as a direct act in favour of God) but is established by implication; therefore the property goes, so to say, into the ownership of God dependently (or indirectly by being surrendered to his creature);

therefore Wakf becomes like *Sudka* and *Zakat*." The original Persian runs as follows:—

و گفته است محمد رح که زایل نمیشود تا آن زمان که متولي نماید برای آن و تسلیم کند آنرا بمتولي و بر همین فتوی است و وجه آن اینست که حق خدا تعالی ثابت نمیشود در وقف مگر در ضمن تسلیم به بندهٔ خدای تعالی چه تملیک بخدای تعالی که مالك جملهٔ اشیاء است قصدا ثابت نمیشود و ضمنا ثابت میشود پس در حکم ملك خدای تعالی میگردد تبعا * پس وقف مانند زکوة و صدقه خواهد بود

The original Arabic is in these words. (See Volume II, page 891, line 8.)

و عند محمد رحمه الله تعالی لابد من التسلیم الی المتولي لان حق الله تعالی انما یثبت فیه في ضمن التسلیم الی العبد لان التملیک من الله تعالی و هو مالك الاشیاء لا یتحقق مقصودا و قد یکون تبعا لغیره فیأخذ حکمه فینزل منزلة الزکوة و الصدقة

49. I have thus shown—

I. That there is no difference between any of the three Imams regarding the validity of a Wakf on one's children and descendants how low so ever, and thereafter on the poor.

II. That there is a difference regarding the validity of a Wakf on one's self, but Aboo Yusoof's view affirming its validity is the accepted and standard view.

III. That by *Ijma* it has been established that the owner can appoint himself Mootwally; and that to do so is in conformity with the view of Aboo Yusoof.

50. It will be noticed that Mahomed's view that one cannot make a Wakf upon himself arises from the view that there must be a complete surrender to the Mootwally in order that the owner's dominion and proprietorship should cease to exist in him and come to be vested in God: and it is from that point of view that Mahomed says that the theory of *Suwab* invoked by Aboo Yusoof should give way: but Aboo Yusoof says that the considerations which Mahomed mentions are not sufficient to outweigh the consideration of *Suwab*.

51. In fact, the whole of the law of Wakf is based on the theory of *Suwab*, and it is impossible to dissociate one from the other, or to have a correct notion of the law of Wakfs without a correct perception of the theory of *Suwab*; and almost all questions which arise in regard to Wakf, and all the difficulties that are felt in understanding the law

relating to Wakf, can be satisfactorily solved with reference to the theory of *Suwab*.

52. The Fath-ool Kadir at page 832, Volume II, whilst commenting on the opening words of the chapter "Book on Wakf," with which the work on Wakf begins in the *Hedaya* (see Arabic *Hedaya*, Volume II, page 887, and Hamilton, Volume II, page 334), says as follows :—

فتح القدير صفحه ٨٣٢ كتاب الوقف و محاسن الوقف ظاهرة و هي الانتفاع بالدار الباقي على طبقات المحبوبين من الذرية و المحتاجين من الاحياء و الموتى لما فيه من ادامة العمل الصالح كما في الحديث المعروف اذا مات ابن آدم انقطع عمله الا من ثلث صدقة جارية الحديث

"Book on Wakf. And the advantages of Wakf are apparent, and these advantages consist of reaching lasting benefit from land to those persons who are dear, and who consist of the *Zoorryat* (or kindred) and the poor, whether they be alive or dead; because in making Wakf there is the perpetuating a good act as the tradition of the prophet lays down, 'when a man dies, his acts cease except by three things; *Sudka-i-Jareea* (or perpetual Wakf), etc., up to the end of the tradition' (the other two things being first, knowledge from which his many pupils who survive him derive benefit; or if he has left no pupils but was an author, he has left behind him his works from which mankind is benefited; secondly, when he has left a son who is dutiful. (See para. 63 (*h*), page 59)."

53. Then the author of the Fath-ool Kadir says at page 833, Volume II :—

فتح القدير صفحه ٨٣٣ و سببه ارادة محبوب النفس في الدنيا ببر الاحياء و في الآخرة بالتقرب الى رب الارباب جل و عز

That is, "the *Subub* or cause of making Wakf (or the end in view in making Wakf) is the intention of the Wakif to carry out his cherished desire, as regards this world, by giving benefit to the living, and as regards the world to come by obtaining *Tukurroob* to (or *Suwab* from) God, the Great."

54. He then deals with the conditions of the validity of a Wakf and says Islam is not a condition.

55. Therefore if a Zimmee makes a Wakf on his children and *Nusul*, and renders the ultimate destination to the poor, this is valid; and amongst the poor shall be included both the Zimmees and the Moslems: and if he restricts it to the poor of the Zimmees, this is also valid. And if the Zimmee makes Wakf on his children and *Nusul*, and afterwards on the poor, with a stipulation that if amongst his children,

one becomes a Moslem, then he shall be excluded, this stipulation is valid. Then follow the reasons why this should not be viewed in derogation of Islam. Then follows this passage in the Fath-ool-Kadir in the same page and Volume :—

فتح القدير صفحه ٨٣٣ شرط صحة وقفه ان يكون قربة عندنا وعندهم

That is, " the condition of the validity of the Wakf of a Zimmee is what amounts to *Koorbut* both according to us and to them." (See para 59, page 57.) If, therefore, the Zimmee makes Wakf on a church for instance, saying that if the church tumbles down, then the profits are to be devoted to the poor, then this Wakf shall be for the poor as from the beginning (because church is not an object of *Koorbut* according to us); and if the Zimmee does not say that ultimately the profits are for the poor (but only makes Wakf on the church), then the property shall be subject to inheritance (and the Wakf on the church shall be avoided). And if the Zimmee makes Wakf for the purpose of enabling people to make *Huj*, the same shall not be valid ; because there is no *Koorbut* in this according to the Zimmees; but if the Zimmee makes Wakf on *Bytool Mookuddas* (Jerusalem), then this is valid; because there is *Koorbut* in this according to us and according to them.

56. Then the author of the Fath-ool Kadir goes on to say at the same page 833 :—

فتح القدير صفحه ٨٣٣ اما المسلم اذا وقف وقفا صحيحا في اي وجه كان ثم ارتد يبطل الوقف و يصير ميراثا سواء قتل على ردته او مات او عاد الى الاسلام الا ان اعاد الوقف بعد عوده الى الاسلام

that is to say, " but if a Moslem makes a valid Wakf for whatever object it might be, *and then becomes an infidel, the Wakf becomes void,* and the property shall become the subject of inheritance, whether he is put to death in consequence of his infidelism, or he dies whilst he is an infidel; or whether he retracts from his infidelism, except when after returning to Islam he repeats the Wakf."

57. It will thus be seen that the idea of *Koorbut* or *Suwab* is an important element in the conception of Wakf, *and in the last case, the consequence of the owner's infidelism is that his Wakf, which is the source of Suwab to him, becomes nullified ; because he himself ceases to be a fit subject for Suwab.*

58. The question then arises, what is this idea of *Suwab,* which underlies the whole of the law of Wakf. To what object should the act relate in order that the act may lead to *Suwab.* Is *Suwab* to be had only by giving to the poor, or can it be had by giving to others also.

What acts are conducive to *Suwab*. Is it necessary to refer to the Mahomedan Law to find out what are those acts; or can it be ascertained at random by a reference to what might appear just and suited to the fancy at a particular time of a particular individual. (See para. 17, page 48.) The answer is, that recourse must be had only to the Mahomedan Law for the purpose of answering these questions, and by that Law any act of self-denial done with a pure motive leads to *Suwab*. The mere fact of divesting one's self of ownership, if done with a pure motive, is an act of *Suwab*. Mathews, in his translation of the *Mishkat*, says at page 453, in explanation of the superlative excellence of charity, the best of alms is a thing from which is left sufficient for the man's maintenance and that of his family; and begin by bestowing on those you have affection for. When a Moslem bestows on his family and kindred, for the intention of rewards, it becomes alms, although he has not given to the poor but to his family and children. The most excellent *dinar* which a man bestows is that which he bestows upon his own family. It is sufficient for them to give to their husbands and the orphans and for them are two rewards, one for their kindred, and another for alms.

59. The acts conducive to *Suwab* must be ascertained from the principles laid down by the Mahomedan Law: that law alone is the guide as to what should be the object towards which the *Ghoollut* or profits of the Wakf must be spent in order that the owner should receive *Suwab*: the authority for this position is conclusive, and has been already submitted when dealing with the Wakf of a Zimmee: when it is a necessary condition for the validity of the Wakf of a Zimmee that the object must be such as to lead to *Suwab* both according to the ideas of the Zimmees themselves and the ideas of the Mahomedans, (see para. 55, page 56), could it be supposed that the condition for the validity of the Wakf of a Moslem could be that which leads to *Suwab* according to non-Mahomedan ideas such as the ideas of a Zimmee: or could it be supposed that the Mohamedan Lawyers left it to policy for the time being to decide what should be the objects which lead to *Suwab*. The Mahomedan Law is immutable: the world must conform itself to the Mahomedan Law, and not *vice versâ*. The two best known places in the future world do not, according to Mahomedan Law, change their nature to suit circumstances or the exigencies of civilised life, and the necessities of commerce.

60. The *Kifaya* shows at page 900, Volume II, how the fact of persons living in a house reverts to the Wakf by way of *Suwab*. The author says, "that a person who is authorised to dwell cannot give an *Ijara*, because *Ijara* is the *Tumleek* of (or the creation of ownership in regard to) *Moonafa* (or profits) for consideration; and *Tumleek* cannot

be made by one who is not an owner, and here the person is not an owner. Then if it be objected that a *Moostagir* (lessee) is not an owner but still he can sub-lease to others for the purpose of dwelling, we say in answer that to a *Moostagir* the *Moonafa* is in his ownership; but in the case of Wakf the *Moonafa* is authorised to the *Moukoof-aleh* (or the person in whose favour the Wakf is made) in order that this *Suwab* of the *Manfaut* should revert to the Wakif."

61. Fathool Kadir, Volume II, pages 846 and 847 on the Arabic *Hedaya*, Volume II, page 901, lays down as follows:—

و اذا جعل الواقف غلة الوقف لنفسه - و لابي يوسف رح ما روي ان النبي صلى الله عليه و سلم كان يأكل من صدقته

(*a*) قال صلى الله عليـــه و سلم نفقة الرجل الى نفسه صدقة روي معنى هذه الحديث من طرق كثيرة يبلغ بها الشهرة

(*b*) فروي ابن ماجة من حديث المقدام بن معدي كرب عنه عليه السلام قال ما من كسب الرجل كسب اطيب من عمل يده و ما انفق الرجل على نفسه و اهله و ولده و خادمه فهو له صدقة

(*c*) و اخرجه النسائي عن بقية عن بحير بلفظ ما اطعمت نفسك فهو لك صدقة الحديث

(*d*) و اخرج ابن حبان في صحيحه عن ابي سعيد عن النبي صلى اللـــه عليـــه و سلم قال ايما رجل كسب ما لا حلالا فاطعمه نفسه او كساها فمن دونه من خلق الله فان له به زكوة

(*e*) و رواه الحاكم الا انه قال فانه له زكوة و قال صحيح الاسناد ولم يخرجاه

(*f*) و اخرجه الحاكم ايضا و الدارقطني عن جابر قال قال رسول الله صلى الله عليه و سلم كل معروف صدقة و ما انفق الرجل على نفسه و اهله فهو له صدقة و ما وقى به عرضه فهو صدقة الحديث

(*g*) و فيه فقلت لمحمد بن المنكـــدر ما معنى و قى عرضه قال ان يعطي الشاعر و ذا اللسان النقي و قال صحيح الاسناد

(*h*) و اخرج الطبراني عن ابي امامة عنه عليه السلام قال من انفق على نفسه نفقة فهي له صدقة و من انفق على امرأته و اهله و ولده فهو له صدقة

(*i*) و في صحيح مسلم عن جابر انه عليه السلام قال لرجل ابدأ بنفسك فتصدق عليها فان فضل شيء فلاهلك الحديث

(*j*) فقد ترجح قول ابي يوسف رحمه الله

(*k*) قال الصدر الشهيـــد و الفتوى على قول ابي يوسف رحمة الله و نحن ايضا نفتي بقوله ترغيبا للناس في الوقف واختاره مشائخ بلخ وكذا ظاهر الهداية حيث آخر وجهه و لم يدفعه

(*a*) "The prophet says:—'For a man to maintain himself amounts to giving *Sudka*': the substance of this tradition has been reported in divers ways; so that by virtue of this publicity, the tradition has reached the stage of (the first class of traditions called) the well-known (or undoubted) traditions." (Then the author shews how the tradition in the same substance is reported by others thus):—

(*b*) "Thus Ibn-i-Maja reports from the traditions reported by Mikdam, son of Madee Kurub, that the prophet said—'Out of the avocations of man, there is no avocation more pure (or praiseworthy) than the one which requires the use of hands; and for a man to maintain himself, and his *Ahl* (or family) and his children and his *Khadims*, amounts to him as a *Sudka*.'"

(*c*) "And the same substance is got out by Nisayee from Bakeea who got it from Buheera in these words,—'What thou makest, eat thyself, the same is to thee *Sudka*' up to the end of the *Hudees*."

(*d*) "And Ibn-i-Hubban says in his work called the Suheeh, that it is reported from Aboo Syed, who reports it from the prophet, who says, 'He who earns property by lawful means and maintains himself and clothes himself from it, or maintains and clothes others besides himself out of the population of God, then verily this amounts to *Zakat* to himself by so maintaining and clothing.'"

(*e*) "And Hakim also has reported this tradition, except that he says 'then verily this amounts to *Zakat* to himself.' And Hakim says the authority for this tradition is undoubted, although Bookhary and Mooslim have not extracted (or mentioned) this tradition (in these very words)."

(*f*) "And the same in substance has been mentioned also by Hakim and Darkootni, who have reported from Jabir, who says that the prophet said:—'Every good act (*maroof*) is *Sudka*, and what a man maintains himself with or maintains his *ahl* (family) with, that for him is *Sudka;* and what a man protects his respectability by is for him *Sudka*,' up to the end of the tradition."

(*g*) "And in the Darkootni it is stated, 'I asked Mohamed, son of Moonkudir, what is the meaning of 'what a man protects his respectability by,' he said, that 'protecting respectability' means to give presents to the poets and the linguists versed in good language (that is, to protect one's own respectability by satisfying poets, &c., that they might not write verses to ridicule him, such as lampoon and

satire).' And Darkootni says, that this tradition is of undoubted authority."

(*h*) "And Tubrany has reported from Aboo Imama that the prophet said, 'Whoever maintains himself, this to him is *Sudka*; and whoever maintains his wife and his *ahl* (or relatives) and his children, this to him is *Sudka*.'"

(*i*) "And in the Suheeh Mooslim it is reported from Jabir that the prophet said to a man, 'Commence with thyself (that is, first maintain thyself), therefore give *Sudka* for thyself; and then if a surplus remains, that is for thy *ahl*,' up to the end of the *Hudees*."

(*j*) "Thus, verily, preference is to be given to the view taken by Aboo Yusoof."

(*k*) "Sudrool Sheeheed says that Fatwa is given according to the view of Aboo Yusoof, and we also give Fatwa according to the view of Aboo Yusoof, as an inducement to people to make Wakfs; and the Mashaiks of Balkh have also adopted the view of Aboo Yusoof; and this has also obviously been adopted by the *Hedaya*, inasmuch as the author of the *Hedaya* has mentioned the view of Aboo Yusoof last of all without refuting it."

62. Farran Judge in I.L.R., 11 Bomb. Series, page 492, says, the *Hedaya* does not come even to any conclusion between Yusoof and Mahomed. This is obviously incorrect as the last quotation 61 (*k*) shows.

63. Fathool Kadir, Volume II, page 836, on the Arabic *Hedaya*, Volume II, page 888, lays down as follows :—

و اللفظ ينتظمهما

(*a*) فتح القدير صفحه ٨٣٦ ثم ابتدأ بدليلهما فذكر حديث ثمنع هو بالثاء المثلثة المفتوحة بعدها ميم ساكنة ثم غين معجمة و ذكر الشيخ حافظ الدين بلا تنوين للعلمية و القانيث و في غاية البيان انها في كتب غرائب الحديث المصحح عند الثقات منونا و غير منون كما في زعمه

(*b*) قال محمـــد بن الحسن في الاصل اخبرنا صخر بن جويرية عن نافع مولى عبدالله بن عمر بن الخطاب كانت له ارض تدعى ثمغ و قال كان نخلا نفيسا

(*c*) قال يارسول الله اني استفدت مالا هو عندي نفيس انتصدق به

(*d*) فقال رسول الله صلى الله عليه و سلم تصدق باصله لا يباع و لا يوهب و لا يورث و لكن تنفق ثمرته

(*e*) قال فتصدق به عمر في سبيل الله و في الرقاب و للضيف و للمساكين

و ابن السبيل و لذي القربى لا جناح على من وليه ان يأكل بالمعـــروف او يؤكل صديقا غير متمول فيه

(*f*) و حديث عمر هذا في الصحيحين

(*g*) و ما في الكتب الستة عن ابن عمر قال اصاب عمر ارضا بخيبر فاتى النبي صلى الله عليه و سلم فقال اصبت ارضا لم أصب مالا قط انفس منه فكيف تأمرني به قال ان شئت حبست اصلها و تصدقت بها فتصدق بها عمر لا يباع اصلها ولا يوهب و لا يورث في الفقراء و القربى و الرقاب و في سبيل الله و الضيف الحديث و في بعض طرق البخاري فقال عليه الصلوة و السلام تصدق باصله لا يباع و لا يوهب و لا يورث ولكن ينفق ثمره

(*h*) ثم استدل بالمعنى و هو قوله و لان الحاجة ماسة الى ان يلزم الوقف لحاجتـــه الى ان يصل ثوابه اليه على الدوام و قد اشار الشرع الى اعمال ما يدفع هذه الحاجة فيما روى الترمذي بسنده الى ابي هريرة ان رسول الله صلى الله عليه و سلم قال اذا مات ابن آدم انقطع عمله الا من ثلث صدقة جارية و علم ينتفع به و ولد صالح يدعو له و لا طريق الى تحقيق دفع هذه الحاجة و اثبات هذه الصدقة الجارية الا لزومه

(*a*) "Then the author of the *Hedaya* commences with the authorities relied upon by the two disciples, and he mentions the tradition relating to Sumgh."

(*b*) "Mahomed, son of Hussun, in his work called the Asul, says,—Sukhur, son of Jowbura, has reported from Nafa, the emancipated slave of Abdoollah, son of Oomar (the prophet's companion), that Oomar had a piece of land called Sumgh, and Nafa says that Sumgh was a handsome garden."

(*c*) "Nafa says that Oomar said, 'Oh prophet, verily have I acquired property which I regard as very handsome (or valuable); shall I make *Sudka* of it?'"

(*d*) "The prophet said, 'make *Sudka* (*i.e.*, Wakf) of the *Asul* (or substance) of it: it shall not be the subject of sale or gift or inheritance, but the fruits thereof shall be applied to maintenance.'"

(*e*) "Nafa then says, then Oomar made *Sudka* of it in the way of God (that is, for the benefit of persons who are on their way to *Jihad*, and whose maintenance has been exhausted), and for the purpose of purchasing the liberty of slaves, and for the purpose of entertaining guests, and for the poor, and for the travellers, and for the *Zil-Koorba* (relations); and there is no illegality in him who is the Mootwally that he should eat with goodness, or entertain therefrom guests who are not in good circumstances."

(*f*) "And this *Hudees* of Oomar is to be found in the Suheeh i-Bookhary and Suheeh-i-Mooslim."

(*g*) "And in the Kootoob-i-Sittah, the tradition is thus reported from Ibn-i-Oomar himself: and Ibn-i-Oomar says that Oomur obtained a piece of land in Khybur, and then Oomar came to the prophet and said, 'I have obtained a piece of land so that better property I never obtained before: how do you order me to deal with it.' The prophet said, 'If you desire you may detain (or make Wakf) of the substance of it, and make *Sudka* of it.' Then Oomur made *Sudka* of it, so that the substance of it became incapable of being the subject of sale, gift of inheritance, in favour of the *Fukeers* and *Koorba* (or relations), and for the purpose of emancipating slaves, and in the way of God (that is, *Jihad* or *Huj*) and for the guests, &c., up to the end of the tradition. And it is reported in the Bookhary in the following way also:—then the prophet said—'Make the substance *Sudka*, and it shall not be the subject of sale, gift or inheritance, but the fruits thereof shall be used for maintenance.'"

(*h*) "Then the author of the *Hedaya* argues from the meaning and substance of the traditions, and says, and also because necessity requires that Wakf should become *Lazim* (or obligatory) because the man (or the Wakif) is in want that *Suwab* (or spiritual benefit or advantage) of the property should enure to him perpetually; and verily the *Shera* has pointed out towards acts which meet (or supply) this want in what Termizy has reported according to authorities from Aboo Hooraira, to the effect that the prophet said, 'When a son of Adam dies, his acts die out with him, except by three things; *Sudka-i-Jareea* (or perpetual Wakf); knowledge from which benefit is derived; and dutiful children, who should pray for him; and there is no other way to meet (or supply) this want and to make this *Sudka* lasting except by making the same obligatory.'" (See para. 52, page 56).

64. Fathool Kadeer, Volume II, page 837, on the Arabic *Hedaya*, Volume II, page 890, lays down as follows:—

و لان الملك باق منه بدليل انه -

(*a*) و الحق ترجح قول عامة العلماء بلزومه لان الاحاديث و الآثار متظافرة على ذلك قولا كما صح من قوله عليه الصلوة و السلام لا يباع و لا يورث الخ

(*b*) و تكرر هذا في احاديث كثيرة

(*c*) و استمر عمل الامة من الصحابة و التابعين و من بعدهم على ذلك

(*d*) اولها صدقة رسول الله صلى الله عليه و سلم ثم صدقة ابي بكر ثم عمر و عثمان و علي و الزبير و معاذ بن جبل و زيد بن ثابت و عايشـــة و اسما اختها

و ام سلمة و ام حبيبة و صفية بنت حي و سعـــد بن ابي وقاص و خالد بن الوليد و جابر بن عبدالله و عقبة بن عامر و ابي اروى الدوسي و عبدالله بن الزبير رضي الله عنهم كل هولاء من الصحابة

(e) ثم القابعين بعدهم كلها بروايات

(f) و توارث الناس اجمعون ذلك فلا يعارض بمثل هذا الحديث الذي ذكره على ان معنى حديث شريح بيان نسخ ما كان فى الجاهلية من العامي و نحوه

(g) و بالجملة فلا يبعد ان يكون اجماع الصحابة العلمي و من بعدهم متوارثا على خلاف قوله فلذا ترجح خلافه و ذكر بعض المشائخ ان الفتوى على قولهما

(*a*) "And the truth is that preference is given to the view which the Ulemas have universally taken that Wakf is *Lazim;* because the Hadees and Asar support this view; as for instance, the saying of the prophet 'the thing appropriated is not the subject of sale or inheritance, etc., up to the end of the tradition.'"

(*b*) "And this meaning is reported in numerous traditions."

(*c*) "And this view has always been acted upon by the followers of the Prophet from the Sihabas and the Tabyeens downwards to those who came after."

(*d*) "The first was the appropriation made by the Prophet himself; then followed the appropriation made by Aboo Bukur, then by Oomur, and Oosman, and Ally, and Zoobair and Maaz son of Jubul, and Zyd son of Sabit, and Aysha, and Asma sister of Aysha, and Oommi Sulma (wife of the prophet), and Oommi Hubeeba, and Sufya daughter of Hye, and Saad son of Aboo Wakkas; (one of the ten persons who shall certainly go to Heaven); and Khaled son of Waheed, and Jabir son of Abdoollah, and Akhal son of Amir, and Aboo Arwa Dowsy, and Abdoolla son of Zoobair; all these were the Sihabas." (See para. 65 (*b*), page 61).

(*e*) "Then the Tabyeens made appropriations after the Sihabas according to traditions."

(*f*) "And all the people have acted upon this view." Therefore in comparison to such traditions, that relied on by Aboo Huneefa can raise no conflict. Besides this (or add to this) the meaning of the tradition (see para. 29, page 52) reported by Shooraih (ببيع الحبيس) was for the purpose of laying down that what was done at the time of ignorance was rescinded and abolished, *e.g.*, Haamee (as to the meaning of which term and similar terms, *viz.*, Behara, Sayeba and Wasila see Tufseer-i-Ahmady, page 380) Bombay Edition (for the year 1300 Hijree), and such like things."

(*g*) "In short, actually, the concurrence of the Sihabas learned in law and of those who came after them, has always been in opposition to the view taken by Aboo Huneefa; and, therefore, the view opposed to that of Aboo Huneefa has been given preference to; and some of the Mashaikhs have laid it down that the *Fatwa* is according to the view taken by the two disciples.

65. Fathool Kadeer, Volume II, page 841, on the Arabic *Hedaya*, Volume II, page 896, lays down as follows :—

(*a*) و يجوز وقف العقار لان جماعة من الصحابة وقفوه و قوله لان جماعة من الصحابة رضي الله عنهم اجمعين وقفوه

(*b*) قدمنا ذكر جماعة من رجال الصحابة و نسائهم وقفوا و اسانيدها مذكورة في وقف الخصاف

(*c*) و منها ما تقدم من وقف عمر ارضا ثمغ

(*d*) و اخرج ابراهيم الخولي في كتابه غريب الحديث حدثنا ابوبكر بن ابي شيبة حدثنا حفص بن غياث عن هشام بن عروة عن ابيه ان الزبير بن العوام وقف دارا له على المردودة من بناته قال والمردودة هي المطلقة والفاقدة التي مات زوجها

(*e*) وفي البخاري وقف رسول الله صلى الله عليه وسلم ارضا جعلها لابن السبيل صدقة

(*f*) واخرج الحاكم بسند فيه الواقدي وهو حسن عندنا وسكت هو عليه

(*g*) عن عثمان بن الارقم المخزومي انه كان يقول انا ابن سبع في الاسلام اسلم ابي سابقة وكانت داره على الصفا وهي التي كان النبي صلى الله عليه وسلم يكون فيها في الاسلام وفيها دعا الناس الى الاسلام واسلم فيها خلق كثير

(*h*) منهم عمر بن الخطاب رضي الله عنه فسمت دار الاسلام

(*i*) و تصدق بها الارقم على ولده وذكر انه نسخته صدقة بسم الله الرحمن الرحيم هذا ما قضى الارقم الى ان قال لاتباع و لا تورث

(*j*) وفي الخلافيات للبيهقي قال ابوبكر عبدالله بن الزبير الحميدي تصدق ابوبكر بدارة بمكة على ولده فهي الى اليوم

(*k*) وتصدق عمر باربعة

(*l*) وتصدق سعد بن ابي وقاص بداره بالمدينة و بداره بمصر على ولده فذلك الى اليوم

(*m*) و عثمان بردنه فهي الى اليوم

(*n*) و عمرو بن العاص بربط من الطايف و داره بمكة و المدينـــة على ولده فذلك الى اليوم

(*o*) قال و مالا يحصر في كثير

(*p*) و هذا كله مما يستدل به على ابي حنيفة رحمه الله تعالى في عدم اجازته الوقف

(*a*) "The *Hedaya* says, the Wakf of *akar* (land) is valid because a large number (*jamaut*) of the Sihabas have made Wakfs."

(*b*) "I have already described the party of the male Sihabas and the female Sihabas (see para. 64 (*d*), page 60), who have made Wakfs and the authorities thereof are stated by Khussaf in his book on Wakf."

(*c*) "And amongst such authorities, is that relating to the Wakf made by Oomur of (land called) Sumgh as stated above."

(*d*) "And Ibrahim Huzuly has mentioned in his book called *Ghureebool Hudees*, Aboo Bukur, son of Aboo Shybuta, reported to me as follows:— 'Hufs, son of Ghyas, has heard from Hesham, son of Oorwa, who heard from his father that Zoowair, son of Awain, made Wakf of his house on a daughter of his, who had been divorced.'"

(*e*) "And in the Bookhary it is stated that the prophet made Wakf of land and rendered the same *Sudka* for the sons of travel (that is travellers)."

(*f*) "And Hakim has found out by his research that this tradition is supported by authorities, one of whom is Wakidee; and Hakim says this tradition is well founded according to us, and he raised no doubt on the tradition."

(*g*) "It is reported from Oosman, son of Arkum Makhzoomy, that the said Oosman said that he was a boy of (seven) years of age in Darool Islam; my father accepted Islam on the 7th day of the 7th month. And he (the father) has a house on the top of the(hill called) Sufa, and Sufa was the place where the prophet used to remain in the period of Islam (that is, the period after the revelation which is called the period of Islam as contradistinguished from the period of ignorance); and whilst on that hill, he invited people to accept Islam, and a great many people accepted Islam there."

(*h*) "And one of them was Oomar, son of Khuttub, and that place consequently came to be called Darool Islam."

(*i*) "And Arkum made *Sudka* of his house on his children: and Oosman says that the writing by which he made Wakf ran thus:— 'This is *Sudka* in the name of God Most High and Merciful': this

is the way Arkum expressed himself up to the end until he came to say, 'it shall not be the subject of sale or inheritance.'"

(*j*) "And in the *Khilafyat*, the author of which is Byehuky, it is stated that Aboo Bukur Abdoollah, son of Zajeer Hameedy, said that Aboo Bukur (the prophet's companion) made *Sudka* of his land situated in Mecca on his children, and this (Wakf) subsists up to the present day"

(*k*) "And that Oomar (the prophet's companion) made *Sudka* of his cultivated land."

(*l*) "And that Saad, son of Wakkas, made *Sudka* of his house situated at Medina and of his house situated in Egypt, on his children; and that this continues to subsist to the present day."

(*m*) "And that Oosman (the prophet's companion) made *Sudka* (of land situated) in a place called Rooma; and that this continues to subsist to the present day."

(*n*) "And that Amr, son of Aas, made *Sudka* of Burhut situated in Taif (near Mecca, a fruitful piece of land supposed to have been bodily removed by the angel Gabriel from Syria), and made *Sudka* of his house situated in Mecca and Medina, on his children; and that this Wakf subsists to the present day."

(*o*) "And Byhuky says that such traditions are too numerous to be circumscribed."

(*p*) "And all these traditions are such that they could be relied on in refutation of Aboo Huneefa in the view taken by him in regard to Wakf not being valid."

66. The texts and precedents cited above, together with the principle of *Suwab* which as shewn above underlies the whole of the Law of Wakf, are sufficient to establish the validity of Wakf on one's self, and after him on his descendants. The case under consideration should be governed by that principle, and by those texts and precedents. The Mahomedan Law is divine in its origin, and, therefore, decided cases will not serve to lay down the Mahomedan Law, if those cases are contrary to such law. The sources of Mahomedan Law are the Koran, the Hadees, the Ijma and the Kyas. What is binding on the conscience and conduct of the people is the construction of the divine Text by the Mujtahids, Imams and Divines of the Mahomedan Law, and the evolution of the law from the recognized sources in accordance with what is laid down by them: their inferences and deductions are also conclusive so far as the followers or Mookullids are concerned. What the Kazy lays down is not necessarily the Mahomedan Law. What the British Courts lay down is also not necessarily the Mahomedan Law, according to the Mahomedan Law. The Kazy and the

Courts must find their Mahomedan Law from what the Mujtahids and Imams have laid down. The conscience of the people is bound to follow the Mujtahids and the Imams as expounded by the Text-writers. The British legislation has preserved to the Mahomedans what is Mahomedan Law. The meaning of this must be that what is preserved to the Mahomedans is the Mahomedan Law as it should be purely according to Mahomedan Law not as it should be according to principles of policy and rules not recognized by the Mahomedan Law. Aboo Yusoof has not left in doubt what is the Mahomedan Law on the subject. (See paragraphs 39 and 46 of this appendix, pages 53 and 55). What the Privy Council has laid down is directly contrary to what Aboo Yusoof has laid down. So that in effect the Privy Council says—"You Aboo Yusoof is wrong in your Mahomedan Law." The views of the Imams are explained by recognized Text-writers such as the authors of the Hedaya, the Fatawa Alamgeeree and other works of authority noticed by Mr. Morley in the introduction to his Digest.

There is moreover a great diversity in the decisions of the British India Courts on the point, so that it could not be said that the current of the dicisions is the other way : but suppose the current was the other way, it should be checked, and brought back to the right channel at once.

67. The *Hedaya* upon the question relating to the force of decisions and decrees says as follows :—Hamilton's *Hedaya*, Vol. II, page 634.

"It is incumbent upon every Kazee to maintain and enforce the decree of another Kazee, unless such decree be repugnant to the doctrine of the Koran, or of the Soonut, (traditions of the Prophet), or of the opinions or our doctors ; in other words, unless it be a decision unsupported by authority. It is related in the *Jama-i-Sagheer*, that if a Kazee passes a decree in a matter concerning which different opinions have been given, and be afterwards succeeded by another Kazee of a different opinion with respect to that matter, the latter Kazee must nevertheless enforce the decree so made ; for it is a rule that when a Kazee passes a decree in a doubtful case, the decree is executed accordingly ; nor is it permitted to a succeeding Kazee to rescind it ; because although the succeeding Kazee be equal in point of judgment to his predecessor, still the judgment of the predecessor is in this instance allowed a superiority ; because of its having been exercised in passing the decree ; and therefore it cannot be affected by the judgment of his successor, which is deemed inferior from its not having been exercised. If a Kazee in a doubtful case determine contrary to his tenets, from having forgotten the principles of his sect, such

decree must nevertheless be enforced according to Huneefa. If, on the contrary, he pass such decree knowingly, and not through forgetfulness, there are in that case two opinions recorded. According to one the decree must be enforced in that instance also, because the error in it is uncertain. In the opinion of the two disciples the decree must not be enforced in either case; that is, whether the error be wilful or proceed from forgetfulness: and this is the approved exposition. By a doubtful case is meant one in regard to which there is no particular ordinance, either by the word of God, or by the prophet, and concerning which, consequently, different opinions have been supported by the companions and their followers. Where a great number, however, have concurred, and only a few have differed, it is not considered as a doubtful case."

68. In the case reported in Moore's Indian Appeals, Volume XII, page 435, the Privy Council lay down the rule of construction which a European Judge is to follow:—

"All the schools accept as authoritative the text of *Vasishta* which says, 'Nor let a woman give or accept a son unless with the assent of her lord.' But the *Mithila* School apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore, that a widow cannot receive a son in adoption according to the Dattaka form at all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the *Mayookha* and *Koustubha* treatises, which govern the Mahratta School, explain the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all these writers it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.'

"The duty, therefore, of a European Judge, who is under the obligation to administer Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage. For under the Hindu system of Law, clear proof of usage will outweigh the written text of the law."

The question as regards the construction of Texts on Hindoo Law further arose in a case decided by the Privy Council, *viz.*, the case of Bhya Ram Singh *vs.* Bhya Ugur Singh reported in 13 Moore's Indian

Appeals, page 373. It was contended at page 379, that the Dattaka Mimansa in treating on the text which prescribes adoption "by a man destitute of a son only must a substitute for the same always be adopted," explains that, that son there used is inclusive of the son's son and great grandson, and cites Menu, "By a son a man conquers worlds; by a son's son, he enjoys immortality; and afterwards by a son of a grandson, he reaches the solar abode." The question was what was the limit of the Sapindas. At page 390, their Lordships of the Privy Council say, "The subject is important; it is beset by difficulties raised by varying opinions, decisions and comments on a text (other than the one cited above) clear enough if interpreted by the principles of the Hindoo Law according to the Benares School, which is the most orthodox of the different schools. The compiler of the Mitakshara is said to have been an ascetic or devotee, and from that source nothing at variance with the religion of the Hindoos is likely to have flowed. The Hindo Law contains in itself the principles of its own exposition. The Digest subordinates in more than one place the language of texts to customs and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to a language of strained analogies. Approaching this somewhat delicate subject with an unfeigned desire to decide it in harmony with the religious feeling of Hindoos, their Lordships observe that the case furnishes no evidence whatever that the decision under appeal disturbs that harmony. On the contrary the Judges of appeal overrule a former decision given in their own Court which, in their opinion, had disturbed it."

69. To sum up my arguments :—

I. Law and religion are so intertwined with each other and mixed up together that it is impossible to separate one from the other. (See page 44, paragraph 4 ; page 44, paragraph 17 ; page 52, paragraph 35 ; page 61, paragraph 66.)

II. That all dispositions under the Mahomedan Law such as sales, gifts, wills, wakfs, &c., have their origin in religion. (See page 44, paragraphs 3 and 4; page 47, paragraph 15.)

III. That there are four and only four sources of Mahomedan Law and of the Mahomedan Religion and Mahomedan Faith, *viz.*, the Koran, the Hudees (or Traditions of the Prophet), the Ijma (or concurrence of the learned Doctors and Divines), and the Kyas (or ratiocination). (See page 61, paragraph 66.)

IV. That there is no prejudice according to Mahomedan religion, and therefore none according to Mahomedan Law against tying up property. Law and Religion rather favour the tying up of property

provided such tying up leads to religious merit. (See page 44, paragraph 4).

V. That the Text Books on the Mahomedan Law such as the *Hedaya*, the *Futawai Alamgeeree*, the *Fatawai Kazee Khan*, the *Doorool Mookhtar*, the *Ruddool Moohtar* and other works contain expositions of the Mahomedan Law binding on the Courts of British India and binding on the conscience of Her Majesty's Mahomedan subjects. The authority furnished in the writings of such Text-writers on any particular question is in itself an authority of a conclusive nature, so that no other authority is needed. To say therefore that "there is no trace in the decided cases of the doctrine that a man's gift to his own family is in itself a pious use" (see Lord Hobhouse in L.R., 17 I.A., page 28, Sheikh Mahomed Ahsanullah Chowdhry *vs.* Amar Chand) is to overrule the authority of the Text-writers, and to question the correctness of the sources on which they have based themselves, and to repeal the Mahomedan Law on the subject. (See page 61, paragraph 66).

VI. That to lay down the Mahomedan Law in a manner inconsistent with what is laid down by the Imams such as Aboo Yusoof and expounded by such Text-writers is to propound the Mahomedan Law in a manner not binding on the conscience of Her Majesty's Mahomedan subjects. (See page 52, paragraph 35).

VII. That the duty of an English Judge in administering the Mahomedan Law is to see how a particular doctrine is received in a particular Mahomedan school as shewn in the writings of the Imams, as contained in the authorised standard works and Text-writers. (See page 62, parapraph 68).

VIII. That to test a particular question of Mahomedan Law with reference to a question involving another principle of Mahomedan Law so as to arrive at a decision inconsistent with that propounded by the Imams and the Text-writers is to repeal what has been ruled by those Imams and laid down by those Text-writers, and therefore to repeal the Mahomedan Law itself. (See page 61, paragraph 66).

IX. That the current of decisions of British Courts, whether weak or strong, if inconsistent with what is ruled by the Imams and laid down by the Text-writers, and therefore inconsistent with the Mahomedan Law, is no source of the Mahomedan Law, and therefore cannot control the rulings of the Imams and the writings of the Text-writers, and such current of decision must itself be corrected and diverted to a proper channel, so as to be in accordance with the rulings of the Imams and the exposition of the Text-writers, and, therefore, with the Mahomedan Law. (See pages 61 and 62, paragraphs 66 and 67).

X. That the Mahomedan Law of Wakf is what is in accordance with the rulings of the Imams and in accordance with what is laid down by those Text-writers. (See page 61, paragraph 66).

XI. That the Imams and Text-writers were persons of acknowledged learning and ability who had devoted the whole of their lives in the pursuit of the knowledge of Oosool or Jurisprudence and Fikah or Mahomedan Law, and, therefore, their exposition of the Mahomedan Law raises a presumption, which is not allowed to be rebutted, that that exposition is the true Mahomedan Law, they having been the Moojtahids in their days and having possessed the necessary qualifications of a Moojtahid and are revered as such by the whole of the Mahomedan world up to the present day. (See page 52, paragraph 35 ; and page 61, paragraph 66).

XII. That it is an error to suppose that any portion of the Mahomedan Law of Wakf as laid down by the Imams and expounded by the Text-writers is inconsistent with any other principle of the Mahomedan Law, such as the principle of gift as laid down by those very Imams and expounded by those very Text-writers. (See page 45, paragraph 5).

XIII. That no analogy could be raised between the Mahomedan Law of gift, which is a disposition in favor of a person without consideration, and between the Mahomedan Law of Wakf, which is a kind of *Sudka ;* the latter being a disposition in favor of the Almighty for a consideration, the consideration being *Suwab* or religious merit. (See page 45, paragraphs 6, 7 and 8).

XIV. That *Suwab* or religious merit is a consideration equally valuable as, if not more vauable than the consideration of love or money consideration, for the purposes of disposition of property. (See page 45, paragraph 8 ; and page 46, paragraph 9).

XV. That in a state of health a Mahomedan is free to dispose of his property in any way he chooses, provided his disposition takes the form of one recognised by the Mahomedan Law and conforms with the rules and conditions laid down by that law. Family Wakfs are dispositions, which a person is permitted to make by the Mahomedan Law. When he is in sickness or when the disposition takes the form of a will, the right of heirs prevents his perfect freedom of disposition. But when the right of heirs is out of the question, he is unhampered in his disposition, whether it takes the form of a perpetuity or not. (See page 46, paragraph 12).

XVI. That the institution called Wakf should not be mistaken for *Zakat.* In both the motive is to get *Suwab :* but there is a difference in regard to the object, that is to say, in *Zakat* the rich and certain

other classes of persons are prohibited from accepting the gift; but those conditions do not apply to the object of Wakf, in regard to which object the requirements of the Mahomedan Law are quite different; but such requirements do not involve that the object should not be one's self or his children, or that the object should be such as not to be open to the technical rule against perpetuities known in other systems. (See page 46, para. 10).

XVII. That the Mahomedan Law of Wakfs lends no countenance to the supposition that that Law encourages chicanery, and could be used as a machinery to defeat the just rights of *bonâ-fide* creditors, and enables the debtors to cheat their creditors. (See page 47, paragraph 14).

XVIII. In dealing with the law of Wakf the distinction between motive and object should not be lost sight of. The motive is religious and charitable in the sense that it brings *Suwab*, but the object which must satisfy the motive need not to be limited to the poor but may include the rich as well as relatives, because these latter are also the means of *Suwab*. (See page 48, paragraphs 16 and 17).

XIX. Mr. Hamilton misunderstood the motive of Wakf and rendered it "as meaning always of a pious or charitable nature." His mistake consisted in transferring to the object the character of the motive. He has been corrected by Mr. Baillie: but his mistranslation has been the source of all mischief in the diversion of the law from its true groove. (See page 48, para. 16).

XX. That the Mahomedan Law alone can decide what objects lead to *Suwab* and are calculated to fulfil a pious or charitable motive. The Mahomedan law lays down that *Suwab* could be obtained and a pious or charitable motive could be fulfilled by making a provision for one's children as well as by making a provision for the poor. (See page 57, paragraph 58; and page 57, paragraph 59).

XXI. In whatever other points relating to Wakf there might have been a difference between the three Imams, there was none in regard to the question what objects bring *Suwab*; because this question flowed from a common religion and admitted of no divergence of opinion. Where there is difference of opinion among the Imams, it must be ascertained which Imam's opinion has been accepted and been the basis of the Futwa of the Kazees. The British Indian Courts cannot introduce a new point of divergence and lay down the Mahomedan Law afresh and introduce as a further condition relating to the validity of a Wakf that it should not be open to the objection of perpetuity. (See page 49, paragraph 19).

XXII. That it is an error to suppose that, according to Aboo

Huneefa, Wakfs are altogether illegal: on the other hand, according to him a Wakf is a lawful disposition, only that it is not obligatory so as to involve cessation of ownership of the Wakf-maker but is merely permissible, so that the disposition of the profits takes effect by way of a loan: but according to him Wakf becomes obligatory after the decree of the Kazee: and after a Wakf has become so obligatory, the effect according to him is the same as according to Aboo Yussoof. (See page 49, paragraph 21; and page 51, paragraph 25).

XXIII. That Aboo Yusoof's view in favour of the validity of the Wakf on one's self and his children and then on the poor is the governing authority. Wakf is an institution which should be encouraged. (See page 53, paragraph 39; and page 55, paragraph 46).

XXIV. That even a Zimmee's Wakf is based on what produces *Suwab* both according to us and the Zimmee. (See page 56, paragraph 55).

XXV. That a perfectly valid Wakf according to the Privy Council might become wholly invalid according to Mahomedan Law, as for instance the Wakf of a Moslem who becomes an infidel: the test on which the Privy Council has proceeded, *viz.*, the liability to the objection of perpetuity is an incorrect test, inasmuch as the case of the apostate's Wakf is not governed by the rule laid down by the Privy Council. The true test is the theory of *Suwab*, which applies without exception to all cases. (See pages 56 and 57, paragraphs 56 and 57).

XXVI. The acts that are conducive to *Suwab* are authoritatively laid down by the Imams when construing the Hadees or texts of the Traditions of the Prophet, which are set out in a binding and authoritative way by the Text-writers. (See page 57, paragraph 61; page 58, paragraph 63; page 59, paragraph 64; and page 60, paragraph 65).

XXVII. That the *Hedaya* does not leave it as a doubtful matter whether Aboo Yusoof's view is the governing rule in the case of a Wakf. (See page 58, paragraph 61 (*k*) and paragraph 62).

MAHOMED YUSOOF.

Supplement No. 1 to the Review, containing matter in continuation of para. 21 at p. 168*n*. This supplement contains paragraphs numbered 22 to 30.

(EXTRA APP. PARAGRAPH 22.)

22. No discussion of what is Suheeh, Batil or Fasid would have even the semblance of completeness unless it were accompanied by some notice of the difference between Hookm or command and Shoobha-i-Hookm or doubt of command. As stated above in paragraph 12, in discussing III°, it will be observed that in order that a command should come into existence it is necessary, in addition to what is required in I°, II° and IV°, that the conditions on which the existence of a command rests should be fulfilled, *e.g.*, Nikah, which in addition to the other three conditions, relating to Ahleut, Mahalleeut and Illut, requires that the condition or Shurt for the command coming into existence should also be found; this condition is the presence of witnesses: so that if the witnesses are not present at the Nikah, the command from God relating to the validity of the Nikah does not arise, notwithstanding the compliance of the other requisites. This principle that the command or Hookm does not come into existence when it is unaccompanied by the conditions necessary therefor, is subject to another principle, *viz.*, the principle of Shoobha-i-Hookm or doubt of command; and this latter principle is based on the following reason, *viz.*, that the presence of Ahal and Mahal and Illut leads *prima facie* to the conclusion that the command or Hookm must have emanated from God and come into existence, because when the condition as regards Mahal is fulfilled, then it seems proper that the absence of other matters should not lead to a nullity. But at the same time there is an equally plausible argument the other way, *viz.*, that the absence of the Shurt or condition necessary for the existence of Hookm or command leads to the inference that the command is absent. Thus there are two conflicting principles operating at one and the same time in opposite ways. One principle is that the presence of Mahal leads to the inference that the command is present, but the absence of the condition relating to the existence of the command leads to the inference that the command is absent. Thus, there arises a Shoobha or doubt as to whether the command or Hookm, in such a case, is found or not found, that is to say, whether such command has emanated from God or not. If the condition of the existence of the command along with the other

three matters had been found, then the Hookm or command would have been that the particular act or transaction was Saheeh or valid. If the Mahal had been absent, and the other three requirements had been present, then the act would have been Batil or absolutely void. But in a case where the Mahal is present, that is, when the Mahal is good and unobjectionable, but the condition for the Hookm or command is wanting, there the act or transaction is neither Saheeh or valid nor Batil or void, but Fasid or defective or invalid. It is for this reason, that in a case of Nikah, where there are no witnesses to it, the command or Hookm affirming the validity of the Nikah is absent; but the Mahal being fit and the form of Nikah having been gone into apparently there is Shoobha or doubt of Mahal and, therefore, some of the consequences of a valid marriage, such as the establishment of Nasab and so forth are attached to such marriage. This subject is dealt with in Mira, p. 295 and 347, in Kashf-i-bazdavi, Vol. I, p. 259, in the chapter on Nahee and in Azmery, Vol. 2, p. 412, etc. The first-named author says, "And for this reason there is no Shoobha or doubt of Nikah in the case of maharim or those women who are prohibited to marry; and there is no doubt or Shoobha in the case of a sale of Hoor or freemen, because the meaning of Shoobha or doubt is the establishment of Daleel or reason (in favour of the command or Hookm); whilst at the same time the Madlool (or that which is proved by the Daleel or reason, that is to say, the command) is absent on account of (a Mánai or) preventive circumstance. Therefore the Shoobha or doubt is negatived in a case in which the Mahal is absent." At page 348 of the Mira, the divisions of Shoobha are given, but it is not necessary here to pursue the matter further. The same subject is treated in Kashf-i-bazdavi, Vol. 4, p. 342. See also Mahomed Yusoof's Tagore Lectures, Vol. 3, Appendix p. .

A:—I must state that it is mainly the result of my study of the Principles of Jurisprudence, that has enabled me to identify the idea of a Fasid transaction with one susceptible of the Principle of Shoobha-i-Hookm. But though I submit my inference, with humility and due modesty, still I do the same without diffidence on the point. The subject of the Mahomedan Jurisprudence is one beset with manifold difficulties and one of those difficulties consists in the way in which language is used to convey mental ideas by the Arabian writers in the original. The method adopted by them is to go on stating results and conclusions, one after the other, without assigning any reason, so that it often happens that the reason of a thing is given at one place and the conclusion is given at a very distant place, and there is a large space intervening between the two and the language used

is such as is not generally calculated to lead to elucidation and identification.

B:—In the case of a marriage without witnesses, although such a marriage should result in Fasad, that is invalidity or defect, according to the application of the rule of the Shoobha-i-Hookm, still the practical result of such a marriage is tantamount to nullity or Batil, because although absence of Sihut or validity might lead either to *Batil* or void and Fasid or defective and invalid, still the practical result in each particular case will depend on that particular case; if that case is susceptible of an intermediate and inferior degree of unlawfulness such as is implied in the term Fasid or defective, then certainly absolute nullity may not be predicated with regard to it, such as a defective sale: sale is a transaction in which there could be an intermediate degree of unlawfulness, *e.g.*, where the sale does not conform to the conditions requiring the existence of commands there the Mahomedan Jurists have recognised an intermediate state, *viz.*, a state where the sale is not absolutely void or a nullity owing to the fitness of the Mahal, but, at the same time, it does not involve the first class of perfection of essence, owing to absence of the conditions of the Hookm or command: also the intermediate state is that of defect or invalidity, so that the sale has a legal existence, but with some defect, which is capable of being cured when the purchaser obtains possession. But, so far as marriage is concerned, it is different from sale, because there is no intermediate state of lawfulness; it is either lawful or Sahih by which connexion between spouses is legalized, or it is unlawful and amounts to a nullity by reason of which connexion is not lawful.

C:—The state of the law in the above-mentioned case, *viz.*, that of a marriage without witnesses and the admitted effects thereof, *viz.*, first (1) there must be separation between the parties: secondly (2), establishment of *Nasab* and *Iddut*, has enabled me to put two and two together and has led me to the conclusion that the cause of separation is the effect of the nullity of the marriage owing to its participation of the character of what is *Batil* or void; and the establishment of Nasab and *Iddut* arises from the Mahal being a fit one. I have thus been enabled to observe identity and a common point between Fasid and Shoobha-i-Hookm; and a passage in the Kashf-i-bazdawi, Vol. IV, p. 282, in the margin confirms my view.

D:—Is there any intermediate state of Fasad or defect in a case of waqf, in other words, is it possible to imagine a case of waqf which does not involve the first class of excellence, *viz.*, that of being absolutely and perfectly valid or saheeh, and also does not

involve the worst class of defect, *viz.*, that of being a nullity and being absolutely void but still involves the excellence and defect in its intermediate state. I have not yet come across any text bearing directly upon this question, and it is too early for me to hazard a conjecture. It is not for me to make *Ijtahad*, as it is understood in the Muhammadan law; but I may state that junction of excellence and badness in one and the same subject is possible, provided that there are two distinct points of view. In the case of a Fasid sale the excellence could co-exist with the badness, and therefore it is possible to imagine a sale neither absolutely good nor absolutely bad, but being in the intermediate stage, that is to say a stage in which the excellence is accompanied with defect, which defect is capable of being removed to a certain extent. But this state is not possible in the case of a defective *Nekah*, in which the defect is not capable of being removed by any such measure as that by which a defect in a sale is removed. Therefore in the case of *Nekah*, there is either unalloyed excellence or unalloyed badness. But there is still a third case in which excellence has its independent and continued existence, and badness also has, at the same time, its independent and continued existence; therefore both excellence and badness co-exist, and the result is that the excellence brings its own reward and the badness brings its own punishment.

E:—I have come across texts showing that a waqf may be Mouqoof, as in the case of one making a waqf of another man's property by a process similar to that by which a Fazuli sells another man's property. The waqf or the sale in the case aforesaid depends upon the permission of the owner. But I have not come across a case in which a waqf is neither absolutely good nor absolutely bad, but is only partially good and partially bad. The matter requires fuller consideration.

23. As the main principles of the Muhammedan Jurisprudence governing all the transactions as a whole have, for their basis, uniformity in principle and character, so that each transaction has some similarity with the others, it would be useful to state shortly the different classes of sale, and the Muhammadan idea of property.

24. As regards the classification of sale, there are different points of view from which a sale can be classified. Ruddool Moohtar, Vol. 4, p. 1, refers to classification from four points of view.

I. Sale from the point of view that it is Hadis, or means for creation of right, is divided into four classes:—

(1) Nafiz or effective when it at present leads to the Hookm or result of sale (and that is transfer of ownership and the vesting of the property in the purchaser).

(2) Moukoof or dependant, when the sale leads to the result on the permission of the real owner (where property was sold by the Fuzoolee).

(3) Fasid or defective and invalid, when the sale leads to the result on the purchaser obtaining possession of the property sold.

(4) Batil, where the sale leads to no result whatever.

II. The second division of sale is from the point of view of its connection with the property sold (that is to say, the second division of sale arises from its subject-matter); and this division has four classes:—

(1) Where Ain or essence is opposed to Ain or essence, and this is called Mookaiza, *e.g.*, to sell cloth for book.

(2) Where Sumun or a coin or cash is opposed to Sumun or coin or cash, and this is called Surf sale; that is to say, the Mabee or property sold is cash or Nukd.

(3) Where the Sumun, that is, Nukd or cash, is sold for Ain or essence; and this is called a Sulum sale.

(4) Where Ain or essence is sold for Sumun, and this is called Baimootluk or sale as generally understood, for it has no special name assigned to it.

III. The third division of sale is from the point of view of its connection with Sumun or consideration or the amount thereof. From this point of view sale is divided into four classes:—

(1) Moorabiha, where the sale is at a profit,

(2) Towlea, where the sale is without profit,

(3) Wazeea, where the sale is at a loss,

(4) Moosawee, where the sale is without profit and without loss.

IV. The fourth division is where the sale is classified with reference to its connection with the Wusf or quality of Sumun or consideration, in this way that the consideration is either payable at once or payable in future.

25. Sale is also classified as Jaiz and Ghair Jaiz; the former means Nafiz or effective: Ghair Jaiz is subdivided into Batil, Fasid and Moukoof.

26. Sale is also classified into Saheeh and Fasid: and the former is divided into Lazim and Ghair Lazim. It is also divided into Saheeh, Batil, Fasid and Moukoof.

27. Sales in which a Nuhee or negative command is to be found are divided into Batil, Fasid and Moukoof: that is to say, these are sales in which a Nuhee or prohibitive command is to be found in the

Shera. Sales in which no Nuhee or negative command is to be found, in the Shera are :—

(1) Nafiz, Lazim, Bila Khyar, that is, a sale which takes effect at once and which conforms to the Shera in its essence or Asul, in which no right of third party appertains and in which there is no option.

(2) Nafiz, Ghair Lazim, Bil Khyar, that is, a sale which takes effect at once and which conforms to the Shera in its essence, in which no right of third party appertains *but in which there is option.*

(3) Moukoof in which another's right is connected.

28. It will thus be seen that it is a matter of some little difficulty and embarrassment to find out the meaning of a particular author when he uses the following terms in reference to a transaction whatever be its nature:—Jaiz or Ghair Jaiz; Suheeh or Ghair Suheeh; Fasid or Batil. In regard to the last term, it is to be noted that a transaction is divided into Suheeh and Fasid, that is, Ghair Suheeh, and the latter is said to consist of Batil and Fasid (or defective) proper.

29. As regards the idea of property amongst the Mohamedans, it would require much more time and space to discuss the subject fully than I have at present at my disposal. I have extracted texts on the subject which are printed in the supplement for ready reference. It is sufficient to state that the term used in the Fikah for property is Mal. Mal is that towards which the mind of man becomes mail or inclined, and with reference to which the feeling of avarice and temptation, is capable of being entertained by human beings. It is necessary for a thing to be Mal, that it should be capable of being stored and kept for future use. Thus mere Moonafa or benefit is not property such as the right to reside in a house by means of a lease or Ijara. In this sense wine is property. But so far as Moslems are concerned, another condition must be complied with before a thing could become property for them, and that condition is that the thing must be such that a Moslem is not prohibited to use the same by touching it or making any other use of it; in other words, the thing should be such that a Nuhee or negative command, making it Kubeeh lai-ainhee or bad in its essence, should not have been found in the texts in reference to that thing. This idea is denoted by the expression Mal-i-Mootkuwwim or property having value.

30. The next subject that requires passing notice is the meaning of the expression of Taamuloon Nass or custom and practice. It has been given by some authors a meaning most mischievous to Mohammedan Law: it is sometimes said to mean business transaction and

sometimes to mean custom and practice: the latter is a near approach to the real meaning in one sense; but in another sense it is widely different from the real meaning. The real meaning of Taamuloon Nas will be gathered from the following principle. There are only four sources of the Mohamedan Law, *viz.*, the Koran, the Hudees, the Ijma and the Kyas. Custom is not a source of law independently of itself: but if custom is based on Ijma, then and then only is it legal not only for the particular place where the custom prevails but for the whole of the Mohammedan world. But if there is no Ijma to support custom (Taaroof or Adut) then the custom is not binding as law. The common sense of the principle is this: it is necessary for Ijma to be valid that it should be the concensus of Moojtahids or the Doctors in Law, leaving aside for the present other conditions by which the validity of Ijma is surrounded. Therefore the practice of illiterate people who have no real knowledge of law, and of tradesmen and the like is not a justification in law for legalising a particular course of action or for affording a precedent. The texts bearing on Taamul-on-Nissa are also collected in the supplement, and it is not necessary to say more on the subject at present.

Supplement No. 2 to the Review, containing Arabic extracts from original authorities referred to in para. 21 at p. 168 of the Review.

WHAT IS MAL.

4. RUDDOOL MOHTUR, p. 2, EGYPTIAN EDITION.

[ردالمختار جلد ٤ صفحه ٢ مصري چهاپه]

المراد بالمال مايميل اليه الطبع و يمكن ادخاره لوقت الحاجة و المالية يثبت بتمول الناس كافة و بعضهم * و التقوم يثبت بهما و باباحة الانتفاع له شرعا * فما يباح بلا تمول لا يكون مالا كحبة حنطة * وما يتمول بلا اباحة انتفاع لايكون متقوما كالخمر * واذا عدم الامران لم يثبت واحد منهما كالدم بحر ملخصا من الكشف الكبير * و حاصله ان المال عام من المتمول (المتقوم) لان المال مايمكن ادخاره و لو غير مباح كالخمر * و المتقوم يمكن ادخاره مع الاباحة * فالخمر مال لامتقوم * فلذا فسد البيع بجعلها ثمنا و انما لم ينعقد اصلا بجعلها مبيعا لان الثمن غير مقصود بل وسيلة الى المقصود اذ الانتفاع بالاعيان لا بالاثمان و لهذا اشترط وجود المبيع دون الثمن *

وفي التلويح ايضا من بحث القضاء والتحقيق ان المنفعة ملك لا مال لان الملك ما من شانه ان يتصرف فيه بوصف الاختصاص * والمال ما من شانه ان يدخر للانتفاع وقت الحاجة * والتقويم يستلزم المالية عند الامام والملك عند الشافعي *

4. RUDDOOL MOHTUR, p. 7, EGYPTIAN EDITION.

[ردالمختار جلد ٤ صفحه ٧ مصري چهاپه]

و حكمته نظام بقاء المعاش والعالم - حقه ان يقول نظام المعاش الخ فانه سبحانه تع خلق العالم على اتم نظام واحكم امر معاشه احسن

احكام ولا تتم ذلك الا بالبيع والشراء اذ لا يقدر احد ان يعمل لنفسه كل ما يحتاج لانه اذا اشتغل بحرث الارض وبذر الفتح وخدمته وحراسته وحصده ودراسته وتذريته وتنظيفه وطحنه وعجنه لم يقدر على ان يشتغل ببدة ما يحتاج ذلك من آلات الحراثة والحصد ونحوة فضلا عن اشتغاله فيما يحتاجه من ملبس ومسكن فاضطر الى شراء ذلك ولولا الشراء لكان ياخذ بالقهر او بالسوال ان امكن والا قاتل صاحبه عليه ولا يتم مع ذلك بقاء العالم *

KASHF-BAZDAVEE, VOL. I, p. 268.

[كشف البزدوي جلد ١ صفحه ٢٦٨]

اعلم ان البيع مبناه على البدلين لانه مبادلة المال بالمال عن تراض لكن الاصل فيه المبيع دون الثمن - ولهذا يشترط القدرة على المبيع ولا يشترط القدرة على الثمن وينفسخ بهلاك المبيع دون الثمن - وذلك لان المقصود من شرعيته الوصول الى ما يحتاج الانسان اليه من الانتفاع بالاعيان فان من احتاج الى طعام او ثوب مثلا وليس عنده ذلك لا تندفع حاجته الا بالظفر على مقصوده فشرع البيع وسيلة الى حصول المقصود ولما كان الانتفاع يتحقق بالاعيان لا بالاثمان اذ ليس في ذوات الاثمان الا من حيث الوسيلة الى المقاصد كانت الاعيان اصولا في البيوع - وكانت الاثمان اتباعا لها فيها بمنزلة الاوصاف *

فاذا باع عبدا بالخمر كان فاسدا لكونه منهيا عنه لان احد البدلين وهو الخمر واجب الاجتناب فلا يجوز تسليمه وتسلمه الا انها في ذاتها مال - لان المال ما يميل اليه الطبع ويمكن ادخاره لوقت الحاجة كذا قيل *

وقيل هو الشيء الذي خلق لمصالح الآدمي ويجري فيه الشح والضنة وهي بهذة المثابة ولكنها ليست بمتقومة لان التقوم ما هو الابقاء *

اما بعينه او بمثله او بقيمته كما عرف فصلحت ثمنا من حيث انها مال ولم يصلح من حيث انها ليست بمتقومة فلا يمنع اصل الانعقاد لان ما هو ركن العقد وهو الايجاب والقبول الصادر من الاهل صادف محله وهو المبيع من غير خلل في الركن ولا في المحل - و انما الخلل فيما هو جار مجرى الوصف وهو الثمن فصار العقد مشروعا باصله قبيحا بوصفه وهو الثمن فكان فاسدا لا باطلا *

و ذكر في المبسوط في هذه المسئلة ان محل العقد المالية في البدلين و بتخمر العصير لا تنعدم المالية وانما ينعدم التقوم شرعا فان المالية بكون العين منتفعا بها *

وقد اثبت الله تعالى ذلك في الخمر بقوله ومنافع للناس ولانها كانت ما لا متقوما قبل التحريم - و انما ثبت بالنص حرمة التناول ونجاسة العين وليس من ضرورتهما انعدام المالية كالسرقين الا انه فسد تقومها شرعا ضرورة وجوب الاجتناب عنها بالنص *

و لهذا بقيت ما لا متقوما في حق اهل الذمة فانعقد العقد بوجود ركنه في محله بصفة الفساد

(End of copy of *Kashf-Bazdawee.*)

MERATUL-USOOL SHARH MIRQATUL WASOOL, p. 62.

[مرآة الاصول شرح مرقاة صفحه ٦٢]

(فلا يضمن المنافع بالمال المتقوم) اذ لا مماثلة بينهما فان المال عين متقوم و المنفعة معني غير متقوم *

(اما الاول فلان المال ما من شانه ان يدخر للانتفاع به وقت الحاجة *

(واما الثاني فلان المنفعة من الاعراض الغير الباقية كالحركة ونحوها - و غير الباقي غير محرز - لان الاحراز هو الادخار لوقت

الحاجة - و لا ادخار بلا بقاء - وغير المحرز ليس بمتقوم كالصيد والحشيش فالمنفعة ليست بمتقومة فلا تكون مثلا للمال المتقوم فلا تقضى الا بالنص - اودلالته وليس فليس *

وقد فرعوا على هذا الاصل فروعا ذكر ههنا واحدا منها تعريضا لصاحب التنقيح حيث فرعه ابتداء على قوله ما لا يعقل له مثل لا يقضي الا بنص *

(فقال فلا يضمن قاتل القاتل لولي القتيل) لانه لم يفوت لولي القتيل شيئا الا استيفاء القصاص و هو معني لا يعقل المال مثلا له *

و انما قيد بولي القتيل لانه يضمن لولى القاتل الدية ان كان خطاء - و يقتص منه ان كان عمدا - ذكره الحاكم الشهيد في الكافي - (واما) قضاء غير محض بل (شبيه بالاداء كقضاء تكبيرات العيد في الركوع) فان من ادرك الامام في صلاة العيد و هو راكع فان خاف الفوت يركع - و يشتغل بتكبيرات العيد و يكون ذلك قضاء يشبه الاداء لبقاء محل الاداء في الجملة *

فان الركوع يشبه القيام صورة لاستواء النصف الاسفل من الراكع حكما لان مدرك الامام في الركوع مدرك لتلك الركعة لقوله عليه الصلوة و السلام من ادرك الامام في الركوع فقد ادركها *

(واداء قيمة عبد مبهم تزوج عليه) فان من تزوج امرأة على عبد غير معين يكون تسليم عبد وسط اداء و تسليم قيمته قضاء حقيقة لكونها مثل الواجب لا عينه لكنه يشبه الاداء لما في القيمة من جهة الاصالة بناء على ان العبد لجهالة وصفه لا يمكن اداؤه الا بتعيينه الا بالتقويم فصارت القيمة اصلا يرجع اليه و تعتبر مقدما على العبد حتى كانه خلف عنها *

END.

1. AZMERY, p. 272.

[جلد اول از ميري صفحه ٢٧٢]

(قوله - فلا يضمن المنافع بالمال المتقوم) يعني لما كان من شرط القضاء ان يكون للفائت مثل كامل او قاصر او يكون للقضاء نص او دلالة قلنا المنافع المتلفة بالتعدي لا تضمن بالمال المتقوم لعدم المماثلة بينهما اصلا ولانص فيهما سواء كانت المنافع تالفة بان غصب العين و لم يستعملها اصلا ففات منافعها او متلفة باتلافه بان غصب العين واستعملها قيدناه بالتعدي لان المنافع المتلفة بالعقد كالاجارة مضمونة *

وانما ذكر قيد المتقوم تنصيصا على محل الخلاف - فان الشافعي يقول ان المنافع تضمن بالمال المتقوم و توطئة لاقامة الدليل الذي ذكره فانه يقوم على سلب التقوم عن المنافع سواء كانت مالا ام لا اقتصارا على المقصود - وهو انتفاء المماثلة بينهما بانتفاء التقوم - ولا حاجة فيه الى انتفاء المالية *

ولاصحابنا طريق آخر في انتفاء المماثلة بينهما لم يذكره الشارح وهو ان ضمان العدوان مبني على المماثلة بالنص و المنافع و ان كانت اموالا متقومة الا انها دون الاعيان في المالية لعدم قيامها بنفسها فلا تكون مثلها فلا تضمن هذا عندنا *

و قال الشافعي رح المنافع مضمونة في الاتلاف و الغصب مستدلا في الاتلاف بان المنافع اموال متقومة كالاعيان حقيقة وحكما و عرفا - اما حقيقة فلان المال غير الآدمي خلق لمصلحة الآدمي المنافع بهذه الصفة فتكون مالاً متقوما *

واما حكما فلانها صلحت مهرا و ضمنت بالمال في العقود الصحيحة والفاسدة بالاتفاق - والعقد لا يجعل غير المال ما لا

متقوما كما في الخمر والدم و اما عرفا فلان الاسواق تقوم بالمنافع او الاعيان جميعا فان الحانات بنيت للاجارة *

و في الغصب بان الغصب عبارة عن اثبات اليد المبطلة بلا اعتبار اثبات اليد المحقة *

وقد تحقق اثبات اليد المبطلة في زوائد الغصب و منافعه فتضمن *

قلنا في الغصب لا نسلم ان الغصب عبارة عن اثبات اليد المبطلة و لا تتصور الازالة في منافع الغصب لعدم بقائها لحدوثها شيئا فشيئا بخلاف زوائد الغصب فانها من قبيل الاعيان فيتصور فيها الازالة فيضمن - و ليس مثل منافعها - و في الاتلاف ان ضمان العدوان مبني على المماثلة بالنص ولا مماثلة بين العين والمنفعة لاصورة و هو ظاهر لا معني لامرين *

احد هما ما ذكرناه آنفا *

و الثاني ما ذكره الشارح من ان المال عين متقوم و المنفعة معني غير متقوم لكونها اعراضا غير باقية فلا تكون محرزة فلا تكون متقومة فلا تكون مثلا له فلا يقضى الا بنص او دلالة - و كلاهما مفقودان فلا يقضى و هذا قياس مركب بط ريق موصول النتايج تامل *

اما كونها اعراضا فظاهر - و اما عدم بقائها فمبين في علم الكلام و اما عدم كونها محرزة و متقومة فلان الاحراز و التقوم وصف وجودي فلا يوصف به المعدوم و لو بعد الوجود - فان قيل الاعراض قد تحرز باحراز محلها - قلنا ذلك يوجب كونها للغاصب لان العين محرزة لا للمغصوب منه واحراز الغاصب لا يوجب الضمان - لو سلم انها محرزة للمغصوب منه لكنه احراز ضمني لا قصدي - و تقوم الاشياء يتوقف على الاحراز القصدي و لهذا قالوا ان

الحشيش النابت في ارض مملوكة لا يكون متقوما - وان كان محرزا باحراز الارض حتى يضمن بالاتلاف - فان قيل لو كان التقوم يتوقف على الاحراز لما تقومت المنافع - ولما صارت مثلا للعين في العقود *

قلنا لا نسلم انها غير محرزة ثمه بل هي محرزة قصدا بدلالة العقد حكما شرعيا ضرورة جواز العقود للحاجة اليه بالنص على خلاف القياس فلا تتعدى محلها *

وبه خرج الجواب عن قول الشافعي رح انها اموال متقومة كما في العقود *

تحقيقه ان الناس لما كانت محتاجة الى العقود اقام الشارع العين مقام المنفعة في العقود لضرورة حاجة الناس - فصارت متقومة في العقود بالنص على خلاف القياس فلا تتعدى الى باب العدوان *

فان قيل سلمنا ان لا مماثلة بينهما وبين الاعيان لكن لا نسلم عدم المماثلة بينها وبين منفعة اخرى - فلم لا يجوز تضمنها بالمنفعة *

قلنا عدم جواز ضمان المنفعة باخرى مثلها ثابت بالاجماع *

واعلم ان بعض اصحابنا جعلوا العين المستاجرة كالدار مثلا قائمة مقام المنفعة تحفظا لصحة العقد فاضافوا العقد الى العين حتى لو اضيف الى المنفعة بان يقول اجرتك منفعة الدار لا يصح *

والشافعي رح جعل المنافع المعدومة حين العقد كالموجودة في باب الاجارة تحفظا لصحة العقد ايضا حتى صح اضافة العقد الى المنفعة عنده *

والصحيح ما قاله اصحابنا لان ما قاله الشافعي رح يفضي

الى القول بقلب الحقائق و هو جعل المعدوم موجودا فلا يكون مثلا للمال - هذا استدلال من الشكل الاول بطريق موصول النتائج *

(قوله - وقد فرعوا على هذا الاصل فروعا) فرع عليه فخر الاسلام خمس مسائل *

الاولى ان القصاص لا يضمن لوليه بالشهاد الباطلة على العفو بان شهدا على العفو عن القصاص و قضى القاضي بالعفو - ثم رجعا لا يضمنان القصاص عندنا *

الثانية ما ذكره المصنف *

الثالثة اذا شهد الشهود بالطلاق الثلث بعد الدخول ثم رجعوا بعد القضاء بالفرقة لم يضمنوا شيئا *

الرابعة اذا قتل رجل منكوحة غير لم يضمن شيئا عندنا *

الخامسة لو ارتدت المرأة بعد الدخول لم تضمن لزوجها شيئا عندنا و قال الشافعي رح تضمن الشهود و القاتل والمرتدة للزوج مهر المثل *

والمصنف ترك هذه الفروع حذرا من التطويل - وذكر واحدا منها تعريضا على صاحب التنقيح فانه فرعه ابتداء على قوله ما لا يعقل له مثل لا يقضى الا بنص لا على الاصل المذكور - اعني ان المنافع لا تضمن بالمال المتقوم كما فرعه عليه فخر الاسلام *

ولهذا ذكره المصنف بالفاء التفريعية حيث قال فلا يضمن قاتل القاتل بخلاف صاحب التنقيح فانه ذكره بواو العطف تفريعا له ابتداء على قوله ما لا يعقل له مثل لا يقضى الا بنص اقول لا ضير فيه لصحة تفريعه عليه ايضا تامل *

MIRATUL WASOOL, p. 78.

[مراة الاصول صحفه ٧٨]

(و) النهي عن الافعال الشرعية المقارن (بالقرينة) الصارفة عن الظاهر يقتضي (ما تفيده) القرينة فتصل المفاد بقوله (فيما) اي فيقتضي النهي في صورة تدل فيها القرينة على ان القبح (لعينه) اي لعين المنهي عنه (البطلان) منصوب على انه مفعول يقتضي المحذوف (كبيع المضامين) وهي ما في اصلاب الاباء (و) بيع (الملاقيح) وهي ما في ارحام الامهات فان الشرع جعل محل البيع المال المتقوم حال العقد لتحصل الفائدة والماء في الصلب او الرحم لا مالية فيه فصار بيعها عبثا لحلوله في غير محله كضرب الميت وخطاب الجماد (و) يقتضي النهي في صورة تدل فيها القرينة على ان القبح (لغيره) اي غير المنهي عنه (الكراهة) منصوب ايضا على المفعولية (في المجاور) اي فيما اذا كان ذلك الغير مجاورا للمنهي عنه لا وصفا لازما له (كالصلوة في) الارض (المغصوبة) فان الدليل قد دل على ان النهي عنها للمجاور وهو الشغل بالمكان المغصوب فتكون مكروهة - واعترض بانه ينبغي ان لا يصح كما قال احمد والامامية والزيدية وبعض المتكلمين لان الصلوة تشتمل على حركات وسكنات والحركة شغل حيز بعد ما كان في حيز آخر - والسكون شغل حيز واحد في زمانين فشغل الحيز جزء من ماهيتهما وهما جزء الصلوة وجزء الجزء جزء وشغل الحيز في هذه الصلوة منهي عنه لانه كون في الارض المغصوبة وهو منهي عنه فكان جزء هذه الصلوة منهيا عنه فاستحال ان يكون مامورا به فلم تكن هذه الصلوة مامورا بها اذ الامر بالكل التركيبي امر بالجزء *

واجيب بان المعتبر في جزئية الصلوة شغل ما ولا فساد فيه والا يفسد كل صلوة بل الفساد في تعينه الحاصل من تعين متعلقه وهو المكان المغصوب وفساده ايضا لا يكون من حيث تعينه المكاني بل من حيث اتصافه بالتعدي - وذا مما ينفك عن ذلك الشغل

المعين بتعيين مكانه بان يلحقه اذن مالكه او ينتقل ملكه الى المصلي او الى بيت المال ولا يتصور مثله في الصلوة في الوقت المكروه لان نقصانه في السببية ولا في صوم لان تعيين الوقت معتبر فيه بالوجهين - (و) يقتضي النهي في الصورة المذكورة (الفساد في الوصف) اي فيما اذا كان ذلك الغير وصفا لازما له غير شرط (لا البطلان خلافا له) اي للشافعي وهو بناء على الخلاف الاول - فان الاصل في المنهي عنه عندنا لما كان البطلان جرى على اصله الا عند الضرورة وهي مقتصرة على ما اذا دل الدليل على ان النهي القبح المجاور كالبيع وقت النداء - واما اذا دل على انه لقبح الوصف اللازم فلا ضرورة في عدم جريانه على اصله - فان بطلان الوصف اللازم يوجب بطلان الاصل بخلاف المجاور لانه ليس بلازم - واما عندنا فلان الاصل فى المنهي عنه اذا كان شرعيا ان يصح باصله فيجرى عليه الا عند الضرورة وهي مقتصرة على ما اذا دل الدليل على ان القبح لعينه او جزئه واما اذا دل الدليل على انه لقبح الوصف اللازم غير الشرط فلا ضرورة في البطلان لان صحة الاجزاء والشروط كافية في صحة الشيئ وترجيح الصحة بصحة الاجزاء والشروط اولى من ترجيح البطلان بالوصف الخارجي - واذا لم يكن ههنا ضرورة يجرى المنهي عنه على اصله وهو ان يكون صحيحا باصله *

MIRATUL OSOOL, p. 281, AFTER 3rd LINE.

[مرآة الاصول صفحه ٢٨١]

(والحرام ما يستوجب العقاب) اي يستحق فاعله العقاب على فعله (وهو) اي الحرام (اما لعينه ان كان منشأ الحرمة عينه) كالخمر والخنزير والميتة (او لغيره ان كان) منشأ الحرمة (غيره) اي غير ذلك الحرام كاكل مال الغير *

والفرق بينهما ان النص تعلق في الاول بعينه فاخرج المحل عن قبول الفعل فعدمه لعدم محله كصب الماء - وليس ذلك من

قبيل اطلاق المحل على الحال او حذف المضاف وفي الثاني يلاقي الحرمة الفعل والمحل قابل له كالمنع من الشرب - وقد سبق زيادة بسط له في بحث الحقيقة والمجاز ●

END.

MIRATUL OSOOL, p. 289, AFTER 3rd LINE.

[مرآة الاصول صفحه ٢٨٩]

(والاجارة كذلك) اي الاضافة الى الوقت فان عقد الاجارة علة اسما ومعنى لوضعه وتاثيره في ملك المنفعة - ولذا صح تعجيل الاجرة لا حكما لتراخي حكمه فان الاجارة وان صحت في الحال باقامة العين مقام المنفعة الا انها في حق ملك المنفعة مضافة الى زمان وجود المنفعة كانها تنعقد حين وجود المنفعة ليقترن الانعقاد بالاستيفاء - وهذا معنى قولهم الاجارة عقود متفرقة يتجدد انعقادها بحسب ما يحدث من المنفعة وشبيه بالسبب للاضافة التقديرية كما سبق تحقيقه آنفاً ●

END.

AZMERY, VOL. II, p. 391, AFTER 25th LINE.

[ازميري جلد ٢ صفحه ٣٩١]

(قوله اي الحرام اما لعينه الخ) اعلم ان الحل والحرمة قد يضافان الى الافعال من الاكل والشرب وغيرهما - وقد يضافان الى الاعيان نحو حُرِّمت عليكم الميتة وحُرِّمت عليكم امّهاتكم - واُحلّت لكم بهيمة الانعام - ونحو قوله عليه السلام حرمت الخمر لعينها ففي الاول يكونان حقيقة مستعملة فيما وضعت له ●

واختلفوا في الثاني على ثلاثة اقوال الاول وهو مختار الكرخي انهما مجاز من باب اطلاق اسم المحل على الحال او من قبيل

حذف المضاف فيكون المعنى حرمت عليكم اكل الميتة و شرب الخمر - و نكاح امهاتكم و استدل عليه بان الحلّ و الحرمة من الاحكام الشرعية المتعلقة با فعال العباد لا بالاعيان والمقصود من اللحوم و نحوها والاشربة الاكل و الشرب و من النساء النكاح لا اعيانها فتكون اضافتها الى الاعيان مجازا باحد الطريقين المذكورين *

وذهب عامة مشائخنا و هو مختار فخر الاسلام والمصنف رح الى انه حقيقة - و استدلوا عليه بوجهين - احدهما ان معني الحرمة هوالمنع - و منه حرم مكة و حريم البئر فمعنى حرمة الفعل كونه ممنوعا بمعنى ان المكلف منع من اكتسابه و تحصيله و معني حرمة العين انها منعت عن العبد تصرفاتها فحرمة الفعل من قبيل منع الرجل عن الشيئى كما تقول للغلام لا تشرب هذا الماء - و معنى حرمة العين منع الشيئ عن الرجل بان يصب الماء مثلا و هو اوكد - و ثانيهما ان معنى حرمة العين خروجها عن ان تكون محلا للفعل شرعا كما ان معنى حرمة الفعل خروجه عن الاعتبار شرعا فالخروج عن الاعتبار متحقق فيها فلا يكون مجازا او خروج العين من ان يكون محلا للفعل يستلزم منع الفعل بطريق اوكد بحيث لا يبقى احتمال الفعل اصلا فبقي الفعل فيه - و ان كان تبعا لكنه اقوى من نفيه فيما اذا كان مقصودا قبل و لما لاح على هذا الكلام اثر الضعف بناء على ان الحرمة في الشرع قد نقلت عن معناها اللغوي الى كون الفعل ممنوعا او كونه بحيث يعاقب فاعله وكان مع ذلك اضافة الحرمة الى بعض الاعيان مستحسنة حسا كحرمة الميتة والخمر دون البعض كحرمة خبز الغير سلك بعض المحققين في ذلك طريقة متوسطة و هي ما اختاره الشارح توضيحها ان الفعل الحرام نوعان - الاول ما يكون منشأ حرمته عين ذلك المحل كحرمة اكل الميتة و شرب الخمر و يسمى حراما لعينه - و الثاني ما لا يكون منشأ

الحرمة عين ذلك المحل كحرمة اكل مال الغير فانها ليست لنفس ذلك المال بل لكونه ملك الغير فالاكل محرم ممنوع لكن المحل قابل للاكل في الجملة بان ياكله مالكه بخلاف الاول فان المحل قد خرج عن قابلية الفعل ولزم من ذلك عدم الفعل ضرورة عدم محله ففي الحرام لعينه المحل اصل والفعل تبع بمعنى ان المحل اخرج اولا من قبول الفعل ومنع ثم صار الفعل ممنوعا ومخرجا من الاعتبار فاضيفت الحرمة الى المحل للدلالة على انه غير صالح للفعل شرعا حتى كانه الحرام نفسه وذلك ليس من اطلاق المحل وارادة الحال والا لفاتت تلك الدلالة بخلاف الحرام لغيره فانه اذا اضيف الحرمة فيه الى المحل يكون على حذف المضاف او اطلاق المحل على الحال ●

فاذا قلنا الميتة حرام فمعناه ان الميتة منشأ لحرمة اكلها - واذا قلنا خبز الغير حرام فمعناه ان اكله حرام - اما مجازا او على حذف المضاف والشارح رحمه الله تعالى ذكر هذا الوجه اجمالا ثم احال تفصيله على ما ذكره فيما سبق قبيل بيان الداعي الى المجاز فقد بسطناه ثمه ايضا فارجع اليه ●

END.

Supplement No. 3 to the Review, referred to in Item No. 6, being Appendix B to the Review at p. 157*n*. This Supplement contains Arabic extracts from the following authorities, *viz.*, Miratool Oosool, p. 66 and 67; Azmery, Vol. I, p. 291; 2 Azmery, p. 441—*Omitted*.

MIRATUL OSOOL, p. 66 AND 67.

[مرآة الاصول صفحه ٦٧ - ٦٦]

(وحكمه) اي حكم الحسن لحسن في نفسه حقيقيا كان اوحكميا (عدم سقوطه الا بالاداء او) بسبب (عروض ما يسقطه) مثل الحيض و النفاس للصلوة و الصوم (بعينه) احتراز عن الحسن لحسن في غيره كالوضوء و السعي فانه يسقط بسقوط الغير و يبقى ببقائه كما سياتي - فان قيل المراد بالساقط ان كان ما ثبت في الذمة بالسبب يصح قوله اوعروض مايسقط بعينه لانه قد يسقط بعد الوجوب بالعوارض الحادثة في الوقت - ولكن لاوجه لايراده في هذا الموضع لانه في بيان حسن ما ثبت بالامر - وان كان المراد به ماثبت بالامر و هو وجوب الاداء لايستقيم قوله اوعروض مايسقطه بعينه لان وجوب الاداء بعد ما ثبت لا يسقط بعارض *

اجيب بان الصلوة قد تسقط بعارض الحيض و النفاس بعد ما ثبت وجوب اداءه بالامر فان الخطاب يتوجه عند ضيق الوقت بحيث لا يسع غير الوقتية ثم يسقط عنها اذا حاضت او نفست في آخر الجزء كما سبق في مباحث المقيد بالوقت *

AZMERY, VOL. I, p. 291, AFTER 17th LINE.

[ازميري جلد ١ صفحه ٢٩١]

(قوله اجيب) هذا باختيار الشق الثانى •

واجاب عنه صاحب التحقيق باختيار الشق الاول بان المراد منه ما ثبت بالسبب الا ان السبب لما عرف بالامر صحت اضافة ما ثبت به الى الامر بواسطة كما صحت اضافة ما ثبت بالمقتضى اسم مفعول الى المقتضي اسم فاعل •

END.

Supplement No. 4 to the Review, being extracts of Texts from Arabic authorities bearing on the question of Taamul-oon Noss or custom and practice of Mankind, referred to in para. 30 of Supplement No. 1.

Item No. 1—Extract from Sharai Majamai-ool-Hukaik, p. 308.

[شرح مجامع الحقائق من الاصول لا بي سعيد الخادمي صفحه ٣٠٨]

SHARHE MAJAMEUL-HAQAEQ-MENAL-OSOOL

LE ABU SACEDEL-KHADEMEE, p. 308.

(٥) (يستعمل الناس حجة يجب العمل بها) كذا نقله المصنف رحمه الله تعالى عن التلويح كما يقال العادة محكمة ولذلك كان خرق العادة لا يجوز الا معجزة للنبي او كرامة للولي - والاصل فيه ما رواه احمد في كتاب السنة (ما رآه المسلمون حسنا فهو عند الله تعالى حسن) وفي حديث وائل ذيله و ما رآه المؤمنون قبيحا فهو عند الله تعالى قبيح *

واعلم ان اعتبار العرف والعادة مرجوع اليه في الفقه في كثير من المسائل حتى جعلوا ذلك اصلا - و قالوا في الاصول تترك الحقيقة بدلالة الاستعمال والعادة هكذا نقل عن فخر الاسلام - فاختلف في عطف العادة على الاستعمال فقيل هما مترادفان وهي ثلاثة انواع العرفية العامة كاستعمال الدابة في القوائم الاربع والعرفية الخاصة كاصطلاح كل قوم خاصة كالرفع و النصب والجر للنحاة والعرفية الشرعية كالصلاة و الزكوة - فروعها منها حد الماء الجاري الاصح انه مما يعده الناس جاريا - و منها وقوع البعر الكثير في البئر الاصح ان الكثير ما يستكثره الناظر - وفي معراج الدراية هو المختار - وفي الهداية و عليه الاعتماد - والعرف يعتبر فيما لانص فيه من الاموال الربوية في كونه مكيلا اوموزونا - واما المنصوص على كيله او وزنه فلا

اعتبار بالعرف عندهما خلافا لابي يوسف رحمه الله تعالى - و منها لو باع التاجر في السوق شيئا بثمن ولم يصرحا بحلول ولا تاجيل وكان المتعارف فيما بينهم ان يأخذ البائع من ثمنه كل جمعة قدرا معلوما انصرف البيع اليه بلا بيان للعرف (تذييل) اذا تعارض العرف و الشرع قدم عرف الاستعمال خصوصا في الايمان - فاذا حلف لا يجلس على الفراش او على البساط اولا يستضيء السراج لم يحنث بجلوسه على الارض ولا بالاستضاءة بالشمس - وان سماها الله تعالى سراجا و الارض بساطا *